LITIGATION AND ITS EFFECT ON THE RAILS-TO-TRAILS PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

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THURSDAY, JUNE 20, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:25 a.m., in Room 2141, Rayburn House Office Building, Hon. Bob Barr [Chairman of the Subcommittee] presiding.

Mr. BARR. I'd like to call this hearing of the Subcommittee on Commercial and Administrative Law to order.

I apologize to our witnesses and to the audience and to the Members for our late start. Unfortunately, floor votes interfered. "Murphy's Law" apparently is operative today. We'll try to get around it as much as we can, but of course everybody knows you can't get around "Murphy's Law."

But nonetheless, we'll do our best to move through the hearing with appropriate recognition of our witnesses' very, very busy schedules, so that we can get what we need to on the record; give full opportunity for questions to be asked and answered; and make sure that we have a complete record—and again, to be very mindful of the time constraints on our very distinguished panel today.

In 1983, section 8(d) of the National Trail System Act of 1960 was amended by the Congress, and signed into law by then-President Ronald Reagan, creating what is commonly known today as the "Rails-to-Trails Program." This Federal statute provides a mechanism for conversion of land from abandoned rail tracks previously conveyed for railroad purposes, into recreational trails which are now commonly used in communities across the country for activities such as walking, hiking, and bicycle riding.

For instance, in my home State of Georgia there are a number of railbank trails, including one that runs from the Altamaha River to Vidalia, Georgia; and the second one is the Chikasawhatchee Railroad project, which runs from Albany to Sasser.

While this program has obvious environmental and recreational benefits, the legislative history of this act indicates another important consideration by the Congress was to preserve the commercial viability of the railroad lines, including preservation of our rail corridors which have important implications for our national defense.

At one time, this country depended greatly on rail transportation. However, as technology has expanded and rail transportation became somewhat outdated, a national problem emerged.

And that is, how to use, but preserve, thousands of miles of abandoned railroad tracks.

Through the statutory process referred to as "rail banking," a railroad wishing to cease operating along a particular route can negotiate with a State, municipality, or private group that is prepared to assume financial and managerial responsibility for the right-of-way, but which also agrees to transfer ownership of the corridor back to the railroad.

Under the Rails-to-Trails Act, the conversion to a trail is completed on a temporary or interim basis, because the law potentially provides for two-way conversions: first, conversion to a trail; and second, the possible reactivation of rail service at an undetermined time in the future. The railroad, in essence, banks its ownership of the railway with the trail operator.

Currently, there are 190 railbank corridors in 30 States, representing approximately 4,000 miles of trails. There are a number of communities today considering rail reactivation, and also acquisition of railbanked rail corridors for future use as light rail, commuter rail, and transit lines.

In 1990, the U.S. Supreme Court unanimously upheld the railbanking law as a valid exercise of congressional power under the Commerce Clause of the U.S. Constitution, in the case of Preseault versus Interstate Commerce Commission, stating Congress apparently believed that every line is potentially a valuable national asset that merits preservation, even if no future rail line is currently foreseeable.

However, the Court did not address the question of whether the statute constitutes a "taking" under the Fifth Amendment; but directed plaintiffs to seek recovery for a taking against the Federal Government under the Tucker Act.

The Subcommittee today will hear testimony on how implementation of this statute has affected property owners with land abutting these rails and trails, who may have an ownership interest in the former rail line property. At first glance, it may appear Congress did not consider the fact that if the railroad land was not transferred in fee simple it may belong to the property owner, and not the railroad. However, Congress intended the railbanking aspect of this Federal law would preempt State law and hold the land essentially in perpetuity, until possible rail reactivation.

In the 1996 en banc decision in Preseault v. United States, involving the same plaintiffs as in the Supreme Court case I just mentioned, the U.S. Court of Appeals for the Federal Circuit held that railroad abandonment constituted a per se taking, and therefore would require payment of just compensation to the affected land owners, under the Fifth Amendment.

The Subcommittee will also hear testimony regarding the rather complex litigation being handled by the Environment and Natural Resources Division of the Department of Justice, involving nearly 5,000 pending actions by plaintiff land owners seeking just compensation for the taking of their land.

The Assistant Attorney General in charge of this division within the Department of Justice will discuss the four cases settled, and the potential for a significant increase in these compensation cases against the Federal Government.

It is important for this Subcommittee to consider that all of the funds expended by the Department of Justice to litigate these cases are paid out of the Judgment Fund, providing Congress no real opportunity for budget or appropriations review each year. In addition, the original Congressional Budget Office estimate of Federal costs was zero. This has obviously not been the case in practice.

This complex and resource-intensive litigation is the unintended, unanticipated consequence of enactment of this Federal program. Clearly, there will be significant Federal budgetary concerns to contend with in the next decade, as the number of cases will significantly increase as railbanking continues.

This Subcommittee must examine how the Department of Justice has litigated these cases to date, and if a possible resolution to litigation exists or can be developed. After consideration of all factors, this Subcommittee may recommend Congress act legislatively, or suggest an administrative remedy for the compensation of affected land owners in advance of a potential crisis.

At this time, I'd like to recognize the distinguished Ranking Member, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I thank the Chairman for convening the hearing. I was here at ten, and already expressed to each of the witnesses individually my own personal dilemma. As the Ranking Member of this Subcommittee, I need to be here; but as a Member of the Financial Services Committee, where we are actually marking up a bill—which is distinguished from just having a hearing about a subject matter—I need to be there, also. So as soon as I make a comment or two, I'm afraid I'm going to have to leave. And I will reassure the witnesses that I either have or will read their testimony.

I particularly thank Mayor Murphy for being here. Since we seem to be dealing with "Murphy's Law" today, I'm sure he'll bring some order to that chaos.

This strikes me as kind of an interesting hearing, because it has several ironies to it that are quite interesting to me. First of all, it's quite obvious that some of my colleagues don't like this program. And there is some irony to that, since I, for one, never being a big, big Ronald Reagan fan—It's ironic that this program was signed into law during his presidency. I just note that, just as one of the ironies.

Substantively, it is ironic because it kind of seems to me to bring two conflicting positions that many of my colleagues have taken—or two positions that they have taken independently of each other—into conflict with each other. And so it's kind of like the irresistible force meeting the immovable object.

One of those principles is, a number of my colleagues don't like what they characterize as frivolous lawsuits. They abhor them. And they define them typically as anything that raises innovative legal issues, or questionable legal issues. Or if you cut through the surface and get down to the real nitty-gritty of what their concern is, it's anything that somebody raises in the legal context that seeks a result that they don't want to achieve.

And property owners along these lines have raised some pretty innovative positions in their litigation. I wouldn't characterize them as frivolous. But it is ironic that many of the people who have

been so dead-set against frivolous and innovative lawsuits and class action lawsuits are now springing to the defense of people who, if they were raising some other legal claim, would surely be accused of filing frivolous lawsuits.

The third irony substantively is that those same people have been very strong advocates of the rights of property owners; tried to advance a constitutional amendment, or certainly more aggressive statutory provisions, in the area of takings. And we've had some interesting debates about those things.

So here we are with a real-life context, where all of these kinds of competing principles come into play and actually kind of start to point up some of the conflicts and inconsistencies that exist in the congressional legislative context that actually make our job very, very interesting. That's what makes this place tick. It's kind of like a law school. You can write an exam about some of these interesting legal issues that arise under the jurisdiction of the Judiciary Committee.

And so I'll be interested. It's especially interesting to me to observe these kinds of intramural skirmishes where some of my colleagues' principles seem to be meeting each other head-on, and see how they work through them; particularly when I don't have a special dog in the fight. I mean, I obviously support the railbanking process. I think it was a very innovative thing. Which kind of puts me in an ironic situation, too, because I'm endorsing something that President Reagan signed into law. And I acknowledge that there are ironies on all of our parts.

So I'll be interested to see how this plays out. And I'm sure the witnesses will have their particular perspectives and informational background that will inform whatever decisions we make going forward, and help us to make them better.

Again, I want to apologize to the witnesses for having to leave, but I've got some amendments that I've got to offer on an important housing bill.

Mr. Chairman, if I can do this out of order, I would like to ask unanimous consent to submit for the record the testimony or written statement of Professor Danaya C. Wright. She was a witness that we had initially talked about trying to get to come and testify, and then we couldn't reach her. And then we committed to invite Mr. Murphy. And then she showed up and said, "Yes, I can come," but there wasn't a slot for her. So I wanted to make sure that we got her testimony into the record, so that it will inform us. And so I ask unanimous consent to submit that for the record.

Mr. BARR. Without objection, so ordered.

[The prepared statement of Ms. Wright follows:]

PREPARED STATEMENT OF DANAYA C. WRIGHT

I have been invited to submit testimony regarding the subcommittee's hearings on the effects of recent litigation on the rails-to-trails program. After briefly outlining my qualifications to speak in this area, I will explain the principal issues being litigated in the class-action challenges to the railbanking law. Then I will analyze the legal and economic impact of those cases and offer my own opinion on the statute in question.

Qualifications:

I am currently an Associate Professor of Law at the University of Florida's Levin College of Law (2001-present). Prior to that, I was an Assistant Professor of Law

at the University of Florida Levin College of Law (1998–2001). Before to that, I was an Adjunct Professor of Law at Indiana University College of Law at Indianapolis (1996–1998). And prior to that, I was a Visiting Professor of Law at Arizona State University College of Law (1993–1994). I hold an A.B. and J.D. from Cornell University and a Ph.D. in political science from Johns Hopkins University.

I have written and lectured extensively on the topic of state and federal property law applicable to the ownership of railroad rights-of-way and their conversion to recreational trails. My publications include: "Does The Government's Left Hand Know What Its Right Hand Is Doing?: The Intersection Of Federal Railroad Land Grants And Railbanking Policies," article in progress; "Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?" 26 *Columbia Journal of Environmental Law*, 399–481,(Spring 2001); "The 'Anti-Boomer Effect:' Property Rights, Regulatory Takings, and a Welfare Model of Land Ownership" 6 *Australia Journal of Legal History* 1–28 (Summer, 2000); "Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries," (co-authored with Jeffrey M. Hester), 27 *Ecology Law Quarterly* (May, 2000); "Trains, Trails and Property Law: Indiana Law and the Rails-to-Trails Controversy," 31 *Indiana Law Review* 753–780 (1998); "Private Rights and Public Ways: Property Disputes and Rails-to-Trails in Indiana," 30 Indiana Law Review 723–761 (1997).

After publishing many of these articles, I was contacted by the Department of Justice to serve as an expert witness and consultant in their rail-trail cases. I have also served in a very limited capacity as an expert witness in 5 private lawsuits dealing with railroad property rights acquired in the nineteenth century. My participation in those lawsuits is primarily to read nineteenth-century deeds and render an opinion on the property rights acquired by the railroad. Because doing so requires a thorough knowledge of the property law governing railroad lands applicable in each state, I have researched the law of railroad property in many states and understand the subtle variations that have contributed to much of the litigation at issue here. I also teach property and estates and trusts, a course on the federal Constitutional takings and due process clauses, and a variety of legal history courses.

The Legal Questions Raised by the Litigation:

As you well know, 16 U.S.C. § 1247(d) provides that rail corridors, in the process of being abandoned, may be railbanked for future reactivation. During the banked period, interim trail uses are allowed and all the while federal jurisdiction remains over the corridor. Because federal jurisdiction continues, all state-created property rights remain suspended while the legal status quo continues. The legal dispute at the heart of these cases is whether the suspension of these rights constitutes a taking of property for which compensation is required. To be clear, however, the state-created property rights are not present fee simple or possessory rights to use or occupy the land. The rights that are allegedly taken are the rights to have control of the land shift back to the underlying fee owner, or adjacent land owner, upon abandonment of the railroad's interests. Because abandonment is not occurring when the corridor is railbanked, the contingent future interests in the corridor land do not vest and become possessory. The federal statute halts the shifting of property rights that might occur under state law, but it is hard to see how it "takes" anything. A little history should help clarify the issue.

Most rail corridors were acquired in the 19th century through a complex process whereby the railroad's land agents went out and acquired deeds for parcels along a corridor mapped out by the railroad's surveyors. The property rights acquired by the railroad vary from fee simple absolute, to defeasible fee simple, to perpetual easements, limited easements, licenses, profits, and certain future interests. After a century of litigation, however, most property disputes settle into a binary structure in which the question becomes whether the railroad acquired fee simple or a mere railroad easement in the land under its tracks. If the railroad is found, by review of the 19th-century deeds, to have acquired fee simple absolute title to the land in its corridor, it may sell that land, bank it under the federal railbanking program, grant easements for telecom purposes, or do anything any other fee simple title owner may do. However, if the railroad acquired only an easement, limited for railroad purposes, that easement may terminate when the railroad use ceases. If the railroad abandons its corridor land, takes up tracks and ties, and generally evinces an intent not to retain that easement, the burden is removed and the underlying fee owner may retake possession. Until the easement has been abandoned, however, the fee owner is not entitled to enter the land burdened by the railroad easement, may not in any way interfere with the railroad's use of the land, and may not authorize others to enter, such as telecom or utility companies.

Because each state defines railroad easements a little bit differently, and because each has a different standard for determining what constitutes the intent to abandon a railroad easement, the railroad may have an easement terminated in one state where the same actions would not cause termination in another state. This divergence among states, as well as the complex variety of property rights that might exist along a single corridor, makes it impossible to speak of the railbanking statute as having a unitary effect on all land everywhere. Parcels comprising each corridor may differ, the railroad's actions with regard to each parcel may differ, state law governing the property rights a railroad can acquire may differ, federal jurisdiction under the Interstate Commerce Commission Act may have different effects on property rights, and subsequent actions by landowners and the railroads may lead to even more variability. But insofar as the allegation in these cases is that the railbanking statute "takes" property, the first question to be addressed is whether or not the petitioners have any property rights in these corridors.

The federal railbanking statute, passed in 1983, provides that all railroad easements will remain intact during the period in which the corridor is banked, thus protecting the corridor from disintegration so it will be available for future reactivation should transportation needs so dictate. Thus, even if the railroad's actions would constitute abandonment in one state, so that the easement would terminate and the burden be removed, the railbanking statute prevents that termination so the railroad easement remains alive.

Litigation over these rail corridors generally takes one of three forms. A number of plaintiff's attorneys have filed class-action suits in many states arguing that under that state's law, for a particular rail corridor, all the land acquired by the railroad was an easement, that the railroad has abandoned those easements, and that the land should "revert" back to the adjacent landowners. These cases are primarily litigated in state courts and depend on a close reading of the 19th-century deeds in light of railroad statutes of the time, and current cases on whether it is permissible, under that state's laws, to shift the use of a railroad easement from rails to highways, canals, trails, or other public uses. They also analyze the state's rules on abandonment to determine if a shift from a railroad use to a trail use itself works an abandonment of the railroad's property rights. And the states are split in the way they have resolved these cases, some stating that the shift in use from railroad to trails is not an abandonment of the railroad easement, while others have held that the shift is an abandonment. The outcome of these cases is important to the outcome of the federal litigation, because whether or not a taking is found to have occurred depends on whether there are recognizable state property rights in these abandoned rail corridors.

The second set of class-action cases are against the telecom and cable companies alleging that the railroads did not have the legal authority to allow utility access on functioning and abandoned railroad corridors. These cases are essentially about how each state defines a railroad easement, and whether that definition permits the apportionment of the easement for non-railroad public uses. Again, however, the first question is necessarily determining what parcels of corridor land the railroad owns in fee, and therefore may apportion, and those which it owns only in easement, and may not be able to apportion to other users. These cases are also relevant to the federal cases because some of the railbanked corridors may have utility easements running along the trail.

The third set of cases focus exclusively on the railbanking statute and allege that the statute is an unconstitutional exercise of Congressional power and that its effects work a taking of the fee owner's property interests. The Supreme Court answered the first question in *Preseault* v. *U.S.*, 494 U.S. 1 (1990), holding that the statute was a legitimate exercise of federal authority under the Commerce Clause. But the Court remanded the question of whether the statute worked a taking in that particular instance to the Court of Claims for review under the Tucker Act. After lengthy litigation and appeals, the Court of Appeals for the Federal Circuit ruled that the U.S. had "taken" the Preseault's land for a trail when it railbanked the old corridor. *Preseault* v. *U.S.*, 100 F.3d 1525 (Fed. Cir. 1996). Judge Plager's ill-reasoned decision, however, held that the railroad easement had been abandoned under state law BEFORE ICC abandonment was sought, federal jurisdiction was lifted, and the corridor was railbanked. Thus, he held that a new property right was taken, a recreational trail easement, which required compensation.

In the midst of the *Preseault* case, a spate of class-action suits were filed against particular railbanked corridors in a number of states. Each, however, depends ultimately on the state property rights that were acquired by the railroad and the state's law on the abandonment of railroad easements. If a state holds that railroad easements can be freely transferred to other public uses, then no property right is taken when the federal statute permits the shift in use from rails to trails. If a state

holds, however, that ceasing railroad use constitutes abandonment, then the federal statute's efforts to continue the easements intact might be an interference with a landowner's property rights. In all of the cases, however, many of the actual parcels at issue have been removed from the federal class because the railroad actually acquired fee simple, and not an easement. Also, the federal district courts has certified some questions of state property law to the state's Supreme Courts for clarification of certain issues. A few states have refused to certify the class action, noting that class actions are not the proper procedure to follow where, as here, each individual parcel of property is unique and cannot be analyzed in a class action format. But most of the states have certified the classes.

Why The Cases are Improper:

As a property professor, I am concerned with the rules of property law that are being misconstrued, ignored, or misused in these cases. There are only two situations in which the railbanking statute might work a taking. The first is where the landowner conveyed a defeasible fee simple interest to the railroad and retained a reverter interest that would cause a forfeiture if the railroad ever ceased using the land for railroad purposes. The second is where the landowner conveyed only an easement to the railroad for purposes of running trains and retained the underlying fee ownership of the corridor land. Because my experience reading thousands of railroad deeds shows that the vast majority of the land acquired by the railroads was in fact acquired in fee simple absolute (anywhere from 60–95% on most corridors), these cases tie up the fee land for the railroad for the duration of the lawsuit and may in fact "take" the railroad's land for the temporary period of inaction imposed by the litigation. Moreover, the percentage of land held as defeasible fee or as easements is greatly whittled down when we consider that in most states the adjacent landowners have no interest in the railroad corridor under state law. Either they do not have title to the corridor land or their state's laws permit the shift in use from rails to trails without triggering an abandonment. Thus, what sounds at first glance like a lawsuit covering hundreds and thousands of miles of land, when closely analyzed may actually only implicate 1–2% of the land originally tied up.

For the 1–2% of the land, however, we must analyze the property rights that might be interfered with by the railbanking statute. In the instance of defeasible fees, the reverter interest in the landowner is a future interest, an interest much like a lottery ticket. If a certain condition occurs, the ticket holder may acquire ownership. But if the condition does not occur, the lottery ticket ends up where most lottery tickets end up, in the trash can. Because these future interests can cause great disruption when they vest, they are treated harshly by American property law. The common-law rule against perpetuities will terminate some of them in about a generation. Most states also have laws on the non-transferability of these reverter interests, preventing the original landowner from conveying them to subsequent owners. They thus remain in the landowner's estate and pass to his or her heirs, who are most likely impossible to locate. Many states also have rules that cause these interests to expire naturally, when their purpose no longer carries great weight. Other states have enacted statutes to terminate these interests, either specifically terminating them after a certain number of years, or terminating them through marketable title acts if they are not periodically re-recorded to put the current landowners on notice of their existence. To a large extent, therefore, the termination of these future interests, or their postponement through railbanking, is not a taking because the law has probably already terminated these contingent future interests before they vest. Few states, however, have definitely determined whether reverter interests in railroad corridors withstand this multitude of state laws designed to terminate them.

In the second instance, the case of easements, the landowner has retained fee ownership and the railroad only has an easement. These are more difficult to analyze because the law on termination of easements is quite varied and complex. Where the railroad only holds an easement, nearly all states agree that termination of that easement through abandonment occurs only when the railroad forms an intent to give up its property rights in the corridor AND consummates that intent through actions manifesting that intent or actions that are inconsistent with retaining the easement. Thus, a railroad that decides to abandon a corridor and then sells a big chunk of land in the middle of the line, may be held to have abandoned the pieces on each end because those pieces alone may not be sufficient to allow them to continue to offer rail services. However, under different circumstances they might abandon a big chunk in the middle, but retain pieces on each end which connect a principal shipper with a main trunk line so they can abandon the middle piece but still retain some services over each end of the line. In that case, they would not

be held to have abandoned the end pieces, especially if they connect up with other rail lines.

If only the rule were as easy to apply as it is to state. Although this common-law rule on abandonment of railroad easements is the same in all states, a few states have enacted statutes changing the rules, like Indiana's, which omits the intent element and holds that obtaining an ICC abandonment certificate plus removing tracks and ties constitutes abandonment. Other states have enacted rules that certain actions are deemed conclusive proof of intent, like removal of tracks and ties for a certain period of time. Other states, retain the common-law rule, but interpret it strictly so that relatively slight indications of nonuse by the railroad will be deemed to be intent to abandon. Others, however, will protect the railroad's property rights even through long periods of non-use, inaction, bankruptcy, sale, and consolidation that might lead to significant restructuring of the tracks, sidings, and other facilities. Thus, although the rule is virtually the same, the outcome may differ across state lines.

But despite the variation among state rules on abandonment, the vast majority of states will hold that evidence of intent not to abandon will retain the railroad's easements intact. Thus, payment of taxes, controlling grade crossings, leaving ballast and embankments, and other acts of dominion constitute evidence not to abandon. This is the key to the question of whether the railbanking statute works a taking. Because every railbanking agreement includes a provision by which the railroads retain a right to re-enter, repurchase, or some sort of pre-emptive right to reclaim the corridor for future rail purposes, the railroad is clearly intending that the property rights remain alive. The presence of these provisions, which are a property right retained by the railroad, would not make sense if they intended to abandon the corridor completely and allow an extinction of all their rights. In other words, the railroads would not explicitly write an agreement in which they clearly retain a property right in their corridor land if they had formed the intent to relinquish all their property rights ab initio.

Only those states that have removed the intent element altogether and replaced it with some set of extrinsic physical criteria might hold that abandonment occurred despite the railroad's attempt to retain some property rights through their contractual rights to re-enter. But the key here goes back to the idea of vesting. Until a property right has vested, a property owner has no vested rights in a particular property regime. Thus, zoning laws, for instance, can be changed without implicating a duty to compensate so long as a landowner has not obtained a vested right in the prior zoning scheme. That can be accomplished only through the obtaining of building permits and substantial investment in reliance on the prior scheme. Without that reliance, the statutory scheme may be changed, contingent rights may be destroyed, and lottery tickets may become valueless. Because the vast majority of petitioners in these cases can show no reliance and no vested right in the state's laws on abandonment of railroad easements, no property right is being taken; the government is simply postponing a benefit that the landowners had no vested right to obtain. The railbanking statute provides, in fact, a clear, unequivocal procedure for manifesting an intent not to abandon. And one can hardly complain when a neighbor decides not to give you something that he owns.

These cases, when analyzed properly, show that great effort has to be taken to determine the property rights of each owner along a railroad corridor, the intent and actions of the railroad in abandoning the corridor, and the effects of a wide variety of state laws on each individual parcel. Not surprisingly, all states have a very competent procedure for undertaking this analysis: a quiet title action. The attorneys for these petitioners, however, hope to sidestep this procedure which is costly for its relatively small reward, and pursue class actions which permit aggregating the damages for each landowner. The problems with such a procedure are too numerous to catalogue here. But the principal ones are that the procedure ties up an entire corridor for what may turn out to be only a handful of parcels that are affected. In one class-action suit in Indiana, all of the CSX rail corridors in that state were frozen for the decade of the suit, even though the vast majority of the railroad's land was held in fee simple and was not ultimately at issue in the case. Because it takes years and even decades to do the title work necessary to determine who has a property right in the corridor that might be affected by the railroad's actions, an awful lot of effort is spent determining what everyone knew all along, which is that the railroad owned the land. Furthermore, every piece has to be analyzed under a class action when the return on that analysis is so slight: 1–2% of property actually implicated. The better procedure is to have petitioners who believe they have rights that are affected by the railroad's actions pursue an individual quiet title action and determine their rights in a quick, straightforward manner. The recovery to the landowner will be the same under either process; but the recov-

ery to the attorneys will be far less under the quiet title action. Judge Posner warned that class-action suits should be carefully scrutinized because they tend to be filed solely for the benefit of the attorneys, not the purported petitioners. *Penn Central Transp. Co.* v. *U.S. Railroad Vest*, 955 F.2d 1158 (7th Cir. 1992). These cases are clear examples of that phenomenon.

Despite predictions by lawyers for these petitioners, I believe, from my own experience and research looking at thousands of railroad deeds and hundreds of state statutes and cases, that when all is said and done, very few landowners will have had their property rights "taken" by operation of the railbanking statute. The law simply does not support their claims, and to the extent they have had any success so far, it is because they have assiduously avoided actually looking at the deeds that originally granted the property rights. They have talked around the issues and argued in the hypothetical in order to get their classes certified, but they have had very little success when courts have actually gotten to the merits.

The Effect of the Litigation:

The fact that the cases have little merit, however, does not mean they have had little effect. I know personally of instances in which trail groups had obtained federal funding for land acquisition which was thwarted because the land they wanted to buy and the railroads wanted to sell was tied up in a class-action suit that did not even involve, directly, that corridor. When the case was finally settled, it was determined that the railroad owned the vast majority of the corridor in fee simple but it had been prevented from selling those fee parcels by the class action litigation. Perhaps the most significant effect of this litigation is the chilling effect it has had on communities seeking to prevent rail corridor destruction. Threats of multi-million-dollar lawsuits and recall elections have stifled many city and county commissioners from taking advantage of the opportunity to railbank corridors and use them for interim trails. I have been contacted countless times by elected officials and parks department employees who are poised to convert an old rail corridor to a trail and were just threatened with a lawsuit which was predicted would bankrupt the whole municipality. I have made presentations at trail conferences in which I could only advise people that lawsuits would likely be filed, they would be costly to litigate, but that in the end the trail group would most likely win. And I believe that has been a fairly accurate prediction. I have been asked by state legislators to comment on their state railbanking statutes and make suggestions for amendments, and my recommendations are consistently aimed at making their statutes promote the goals of the federal railbanking policy.

Because my contact with these cases usually occurs somewhere in the middle of the litigation when I am asked to come in and address just the property issues, I rarely see the final outcomes. But through anecdotal evidence I have gathered at trail conferences, legislative hearings, and personal contacts, I am struck by the perceptions people have of great threat from these lawsuits. In the end, however, little seems to have come of those threats. The lawyers are getting richer but the landowner rarely gets a dime. If Congress wanted to eliminate these cases altogether, it should establish a procedure for handling these claims that would allow any landowner who believes her property rights are taken to submit a claim, with documentation of her purported rights in the rail corridor, including her deeds, and a summary determination could be made as to whether she has any property rights in the first place. Then a judicial determination could be made as to whether the railbanking process took those rights and, if so, what compensation is due. But these class action suits are most likely counter to the landowner's interests. And they are certainly counter to the public's interests in preserving rail corridors that were assembled with huge public grants. These hearings are vitally important in recognizing that these disputes are not solely issues of private property rights, but also involve the public's rights to protect assets it helped build, its rights to preserve those assets for future transportation needs, and its rights to use public property for the public good. The railroads are quasi-public entities with eminent domain powers; their property is therefore infused with a public purpose that requires public oversight and accountability. These lawsuits assume they are private entities with deep pockets and no fiduciary obligations.

Besides having little merit, I believe the Supreme Court's recent shift in the past year away from protections for private property at all costs reflects a move back to a more balanced position in takings doctrine that ultimately supports my view of these cases. Under the newly-invigorated takings rule originally articulated in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), which requires a balancing of the economic impact of the regulation on the landowner, an analysis of the character of the government's actions, and evidence of the landowner's reasonable investment-backed expectations, the landowners in these rail-trail cases have

little likelihood of success. The economic impact of not being able to incorporate rail corridor land into their backyards most likely does not lower their property values; it simply does not give them a windfall. Moreover, the property values of most land adjacent to a rail-trail increases in value. The character of the government's actions is essentially the destruction of contingent future interests, which have been a vital function of the common-law since the sixteenth century. The destruction of a future expectancy has never carried the same weight as the taking of a present interest in property. Finally, it is hard to imagine that any of these petitioners will be able to show any reasonable investment-backed expectations in the lottery ticket that comprises the abandoned rail corridor adjacent to their land. Most people acquired their land after the railroad's burden was imposed, and they bought their land with full knowledge that a rail servitude existed in the railroad corridor. I can discover no takings theory under which these petitioners would be granted compensation.

Although petitioners might argue that the railbanking statute imposes a physical invasion on their land, they are incorrect. The land had a pre-existing servitude that prevented them from excluding others which, as Justice Scalia has acknowledged, moves them out of the physical invasion line of cases. Scalia stated: "Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved, . . . though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas* v. *S. Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992). These cases are about the windfalls the petitioners expected to receive from the abandonment of railroad easements, windfalls that were interfered with when the regulatory regime changed. Because landowners have no vested rights in a particular regulatory regime, their mere expectancies can be extinguished without liability and the pre-existing limitation continued.

Conclusion:

Although the foregoing discussion may appear technical and verbose, the issues raised by these cases can be even more complicated. In attempting to distill the issues, I have necessarily eliminated many of the nuances. And I can certainly understand any unwillingness to have complex litigation dragged out indefinitely. But the problem is not with the railbanking statue itself. The statute is a brilliant way to encourage railroads to bank their corridors, retain a future right to re-enter, remove themselves from liability for the corridor in the short-term, and provide a public amenity out of land that was acquired with public funds and eminent domain powers. Landowners adjacent to abandoned rail corridors are understandably frustrated that they have no control over whether a rail corridor is going to become a recreational trail, a canal, or a highway, or will be abandoned and made available for private use and absorption into their private land holdings. But the key to this analysis is the public nature of these railroad corridors. I would be quite delighted if my neighbor announced to me that he is abandoning his land and that I can have it if I want it. But my neighbor cannot abandon land that is infused with a public trust; try as he might, the city will not look kindly on his attempt to abandon the public street in front of my house. If the city chooses to abandon the street, I might be entitled to absorb the land into my front yard. But if it chooses, instead, to convert the road into a public park, a canal, or a public tennis court I cannot complain because the land is not mine to begin with. While I might be first in line if the land is abandoned, I cannot complain when public land is not abandoned. I believe there is little difference between public streets and railroad corridors when viewed from the perspective of the adjacent landowner; her expectancy rights are the same.

While all litigation has some effect on the programs and policies the government enacts, only meritorious litigation should be heeded. It is my opinion that these cases are meritless. And to the extent one or two people may find their property rights were interfered with by the railbanking statute, adequate remedies exist. Class action suits are inappropriate mechanisms for protecting those property rights. I believe the government should and will prevail in these cases. Moreover, I believe the railbanking program is terribly important, especially after the devastating September 11th attacks. Protecting railroad corridors and the possibility of alternative transportation needs is a public priority. Given the weak legal claims, the high public purpose, and the incredible popularity of the rails-to-trails program, it would truly be a shame if the program were jeopardized.

Thank you for your consideration of my comments and I would gladly be available to speak further with any of you about the legal issues raised by these cases. I have spent many years researching and writing about the rails-to-trails program and I believe my assessment of the legal issues is a correct, objective reading of the relevant law. I welcome any opportunity to help clarify these matters even more.

Mr. WATT. And I'll yield back the balance of my time. I apologize again to the witnesses, and assure them that I'll review their testimony. Thank you.

Mr. BARR. I thank the distinguished Ranking Member.

The gentleman from Pennsylvania, the Commonwealth of Pennsylvania, Mr. Gekas, is recognized for any opening statement he might care to make.

Mr. GEKAS. Thank you, Mr. Chairman. I do not have a lengthy opening statement, except to ponder what is the alternative dispute resolution bank of efforts on the part of this Committee in the past and what part it plays, they play, in the whole stimulated scheme of things having to do with the subject matter here. That's one point of interest, as a historical feature that I'm eager to study and to learn about.

And secondly, to elucidate further if we can on the constitutional play in these issues; particularly takings and condemnation, the Fifth Amendment, etcetera. So I'm prepared to hear from these witnesses, who seem at first glance to be a bank of experts.

Now, one time when I was in the Pennsylvania legislature somebody told me that an expert was going to testify. And my Ranking Member to my left, or right—probably, to my left—said, "An expert? That's somebody from out of town." I hope that you are experts, but not qualified only because you're from out of town.

I yield back the balance of my non-time.

Mr. BARR. I thank the distinguished gentleman from the commonwealth.

I'd like to introduce the distinguished panel that we do have today. The entire panel will be introduced at the beginning, and then we will turn to each member of the panel for their individual presentations. And then we will have questions from Members.

As the gentleman from North Carolina mentioned, he does have a very important mark-up on some fundamentally important housing legislation, so he will be in and out. There may be other Members that come and go. This is sort of a normally busy day up in the Capitol here, and we have a number of other hearings and mark-ups in addition to floor votes. So we'll probably have Members come and go during the course of the hearing today.

Each member of the panel, each witness, will be given 5 minutes for their oral presentation. However, their full comments and any additional and supplementing material that they wish to have made a part of the record will be received and submitted. And the record will be kept open for 7 days for that purpose, in addition.

The first witness from whom we'll hear today is the Honorable Tom Sansonetti, who currently serves as the Assistant Attorney General in charge of the Environment and Natural Resources Division of the United States Department of Justice.

Prior to arriving at the Environment and Natural Resources Division, Mr. Sansonetti specialized in environmental law, and was a partner in the Cheyenne, Wyoming office of Holland and Hart. Mr. Sansonetti served as the Solicitor for the Department of the Interior from 1990 through 1993. During his tenure as Solicitor, Mr. Sansonetti served as one of six Federal negotiators in the Exxon Valdez oil spill settlement. President George W. Bush has also ap-

pointed Mr. Sansonetti chair of the Presidential Advisory Commission on Western Water Resources.

Mr. Sansonetti is a graduate of the University of Virginia, where he also received his MBA. He received his juris doctor from Washington and Lee University. We welcome Mr. Sansonetti and his considerable expertise to the Subcommittee this morning.

Our second witness will be Mr. Nels Ackerson, chairman of the Ackerson Group, Chartered. This internationally recognized Washington, D.C. law firm represents governments and government agencies, agricultural organizations, financial institutions, and several Fortune 500 companies.

Over Mr. Ackerson's 30-year career, he has served as lead counsel in a billion-dollar nationwide class action litigation against the nation's largest telecommunications companies and railroads. Most notably, he was lead trial counsel for Paul Preseault, the plaintiff in the first compensation case against the U.S. Government for a Fifth Amendment taking of property for a trail.

His career includes founding and managing a Middle East office of a major American law firm, and serving as chief counsel to the Senate Subcommittee on the Constitution. He received his undergraduate degree in economics from Purdue University, with distinction; holds a master's degree in public policy from Harvard, where he also earned his juris doctor and graduated cum laude.

Mr. Ackerson, we're very privileged to have you with us today.

Our next witness is Ms. Andrea Ferster, who currently serves as general counsel for the Rails-to-Trails Conservancy. She is a sole practitioner, concentrating in land use, historic preservation, transportation policy, and tax-exempt organizations.

She has testified on a number of occasions before Congress on the Rails-to-Trails issue. She is also an accomplished speaker, and has made presentations at both the fourth and fifth national Rails-to-Trails conferences, the 13th National Trails Symposium, and the Lincoln Land Institute, on issues relating to the development and management of trails. She holds a BA from Sarah Lawrence College, and a law degree from George Washington University.

Ms. Ferster, it's an honor having you with us here today.

Our final witness today will be introduced by the gentlelady from Pennsylvania—who has not yet arrived, so that honor falls to me.

Mayor Murphy, the Honorable Thomas Murphy, who is serving his third term as Mayor of Pittsburgh, is with us today. And I know that when the gentlelady from Pennsylvania, Ms. Hart, arrives, she'll want to offer her personal words of welcome.

During his 9 years as mayor, Mayor Murphy has directed $4 billion of new investments into his city. Mayor Murphy has helped Pittsburgh become a new center of technology, and has worked to redevelop former industrial sites to create commercial and recreational opportunities along Pittsburgh's waterfronts.

The Mayor has reduced the city's budget, while improving city services. He refurbished neighborhoods by adherence to enforcement of anti-littering laws and establishing the Pittsburgh Clean Neighborhood Collaborative.

Prior to his election as mayor, he served as a member of Pennsylvania's General Assembly; and earned a graduate degree in urban studies from Hunter College in New York.

Mayor Murphy, we very much appreciate your taking time from your very, very time-consuming work as mayor to be with us here today to share your experiences and recommendations.

I would like to again extend a welcome, on behalf of this Subcommittee and the full Judiciary Committee, to each of the witnesses today, and now turn to Mr. Sansonetti for 5 minutes, for your opening statement.

STATEMENT OF THOMAS L. SANSONETTI, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. SANSONETTI. Very good. Chairman Barr and Members of the Subcommittee, I am pleased to be here today to discuss the Environment and Natural Resources Division's litigation involving the Rails-to-Trails program. It's a program that has been a success in many respects. In my testimony, I will discuss the legislation that gave shape to the program, the litigation that the program has generated, and some ways in which we have responded to the challenges that we are facing in defending that litigation.

As the Chairman noted, at its peak in 1920, our nation's railway system had 272,000 miles of track in service. Today, less than half that number of miles is in use. Concerned about the continuing loss of railroad corridors, in 1976 Congress indeed enacted the legislation aimed at preserving the remaining corridors, by converting rights-of-way to recreational trails.

Because the 1976 legislation failed to produce a significant increase in the miles of rights-of-way converted to other uses, Congress enacted amendments to the National Trails Systems Act in 1983. Those 1983 amendments provide the basis of the Rails-to-Trails program.

Now, the program has been a success in many respects. According to the Rails-to-Trails Conservancy, over 100 million Americans use rails-to-trails, of which there are more than 1,100 nationwide, for a total of more than 11,000 miles of trails.

However, the 1983 law that created the railbanking program has also had some unforeseen circumstances. Among those consequences, in particular, it has engendered considerable litigation against the United States. The litigation arises out of the fact that many railroads do not own their rights-of-way outright; but instead, hold them under easements or other property interests. When the railroad acquired only easements that were limited to railroad purposes, those easements would be extinguished, under State law, when the railroad abandoned the property; thus unburdening the underlying fee title, that would typically be owned by the abutting land owners.

When the abutting land owners see that the railroad is ceasing operations, they assume that the right-of-way has been abandoned by the railroad and that it will revert to them, under the terms of their easement.

But as noted above, Congress deemed interim trail use not to constitute abandonment in the 1983 amendments. So because the right-of-way will therefore not revert to them, plaintiffs maintain that their property has been taken under the Fifth Amendment to the Constitution, and that they are due just compensation.

The number of rails-to-trails cases that the Environment Division handles has increased dramatically in the last few years. In 1990, we had one case, with one claimant. Now we have 17 cases, scattered across the nation, with approximately 4,550 claimants. Approximately half of those cases are being litigated in the Court of Federal Claims, with the other half being litigated in the United States district courts.

Now, in my written testimony, I have described some of the special challenges that we face in defending this litigation. And rather than repeat that testimony here, I frankly would just like to briefly discuss some of the ways that we're meeting those challenges.

First of all, I've made it a priority—even though I'm just really in my fifth month—to work with the courts on this. Most Fifth Amendment takings litigation against the United States is brought in the Court of Federal Claims. That court has long recognized that it is each land owner's burden to identify the specific property interest which is alleged to have been taken.

At the beginning of my tenure as the AAG in January, I wrote the chief judge of the Court of Federal Claims, suggesting that the court revise its rules so that it was clear right from the start that such information should be included in the complaint. I'm pleased to say that our suggestion was adopted in the court's new rules, effective May the 1st, 2002.

We believe that this change will help streamline the litigation process before the parties incur significant time and expense, and hope that the district courts will follow the Court of Federal Claims' lead.

Second, we are exploring innovative and creative ways to arrive at speedy resolution of the cases, and that can be very difficult. I mentioned in my written testimony that we have arrived at a settlement in a case called "Marriott versus the United States," fairly early on in that case, compared to others. And we are using the alternative dispute resolution—shorthand is "ADR"—in our more complex cases.

And ADR is an important tool in our takings litigation, and we repeatedly examine our cases for opportunities to make use of it. Examples of cases in which ADR has been helpful include the Moore versus United States case, in which the court certified an opt-in class of approximately 300 land owners, along with so-called "Katy Trail" in Missouri.

Following a finding of liability by the Court of Federal Claims, the parties, with the assistance of the trial judge, agreed to a streamlined, cost-saving process for resolving just compensation, which involved selecting representative parcels for valuation purposes, and then trying the case with respect to those parcels.

Once the court determines the compensation for the representative parcels, we hope that a settlement of the remaining parcels can be achieved. We are following a similar process in the Illig versus United States case, which is another class action.

ADR is an important tool in the litigator's arsenal, and we support the use of ADR when it enhances our ability to efficiently and effectively resolve cases or streamline issues. But I must also caution that it is not a panacea. For ADR to be successful, both sides, you know, must want to make it work. And also, the parties must

have sufficient information about the factual and legal merits of their claims to be able to appropriately evaluate them.

Both of these factors can be problems in the Rails-to-Trails context; in part because of the legally and factually specific nature of these cases, and the relative dearth of case law.

So in conclusion, the Rails-to-Trails program is an important and valuable Federal initiative that has had unexpected consequences in the form of the litigation I have described. So I look forward to working with you on proposals to expedite and streamline the handling of these cases and, of course, will be happy to answer any of the questions you may have today.

[The prepared statement of Mr. Sansonetti follows:]

PREPARED STATEMENT OF THOMAS L. SANSONETTI

Chairman Barr and Members of the Subcommittee, I am pleased to be here today to discuss the Environment and Natural Resources Division's litigation involving the Rails-to-Trails Program, a program that has been a success in many respects. In my testimony, I will begin by discussing the genesis of, and the legislation that gave shape to, the program. I will then discuss the litigation that the program has generated, and the challenges that we face in defending that litigation.

OVERVIEW OF THE RAILS-TO-TRAILS PROGRAM

At its peak in 1920, our nation's railway system had 272,000 miles of track in service. That number has steadily diminished since then, and today, less than half that number of miles is in use. Concerned about the continuing loss of trackage, Congress in l976 enacted legislation aimed at preserving the remaining trackage by converting unused rights-of-way to recreational trails. The Railroad Revitalization and Regulatory Reform Act directed the Secretary of Transportation to prepare a report on alternative uses for abandoned railroad rights-of-way. The Act also encouraged conversion of abandoned rights-of-way to recreational and conservation uses through financial, educational, and technical assistance to local, state and federal agencies. Another provision authorized the Interstate Commerce Commission (ICC) to delay the disposition of rail property for up to 180 days after the effective date of an order permitting abandonment, unless the property had first been offered for sale on reasonable terms for public purposes.

The 1976 legislation failed to produce a significant increase in the miles of unused rights-of-way converted to other uses, so in 1983 Congress enacted amendments to the National Trails Systems Act. The amendments allow a railroad that wants to cease operations along a particular route to reach an agreement with a state, local or private organization to assume financial and managerial responsibility as a trail operator for the right-of-way. The land may then be transferred to the trail operator for interim trail use, subject to the right to restore or reactivate rail use, including use as light rail for commuters, on the right-of-way. This is known as "railbanking." (One example of a railbanked trail is the Capital Crescent trail here in the Washington area.) The amendments provided further that interim trail use of a railroad right-of-way, when the route itself remains capable of supporting potential future railroad uses, does not constitute an abandonment of the rights-of-way for railroad purposes. (It is our understanding that a few trails have reverted back to rail use.) The amendments were intended to protect railroad interests by allowing for future railroad use after service was discontinued while relieving them of responsibility in the interim, and to assist walkers, bikers, and recreational users by providing opportunities for trail use at least on an interim basis.

The 1983 amendments, along with the 1976 legislation, provide the basis of the Rails-to-Trails Program. This program has been a success in many respects. According to the Rails-to-Trails Conservancy, over 100 million Americans use rail-trails, of which there are more than 1000 nationwide for a total of more than 11,000 miles of trails. Further, it is our understanding, based on information that we have received from the Conservancy, that approximately another 1200 rail-trail projects are in the works.

Rail-trails have numerous benefits. The most obvious of these is that they provide transportation corridors, connecting urban, suburban and rural areas, giving thousands of Americans a safe and convenient means of commuting by foot or bike to work or traveling to shopping, schools, and other destinations, while preserving natural landscapes and plant and animal habitat. They also offer recreational opportu-

nities for walkers, runners, inline skaters, cyclists, and cross-country skiers and allow disabled individuals to exercise in a safe environment. Rail trails also create economic opportunities for nearby businesses and transform abandoned urban rail corridors into greenways that revitalize cities. And of course, they also preserve these corridors for future transportation needs, particularly rail use—without preservation of these corridors, it is likely that the option of re-converting them to major transportation arteries would be lost.

LITIGATION IN CONNECTION WITH THE RAILS-TO-TRAILS PROGRAM

However, the 1983 law that created the railbanking program—and with it, so many benefits for so many Americans—has also had some unforeseen consequences. In particular, it has engendered considerable litigation against the United States. This litigation arises out of the fact that many railroads do not own their rights-of-way outright, but instead hold them under easements or other property interests. When the railroad acquired only easements that were limited to railroad purposes, those easements would be extinguished under state law when the railroad abandoned the property, thus unburdening the underlying fee title that would typically be owned by the abutting landowners. When abutting landowners, such as the plaintiffs in our cases, see that a railroad is ceasing operations, they assume that the right-of-way has been abandoned by the railroad and that it will revert to them under the terms of their easement. But as noted above, Congress deemed interim trail use not to constitute abandonment in the 1983 amendments. Because the right-of-way will therefore not revert to them, plaintiffs maintain that their property has been taken under the Fifth Amendment to the Constitution and that they are due just compensation.

The number of rails-to-trails cases that the Environment Division handles has increased dramatically in the last few years. In 1990, we had one case with one claimant. Now, we have seventeen cases scattered across the nation with approximately 4,550 claimants. Approximately half are being litigated in the Court of Federal Claims, with the other half being litigated in the United States District Courts.

In the last three years, we have resolved four cases and remain generally open to settlement discussions where appropriate, but the settlements that we have arrived at so far have made only a small dent in our overall exposure. For example, in one such case, *Marriott* v. *United States*, we settled a case involving a single property in Illinois by paying the owner the appraised value of $6,000, paying an additional $12,750 in attorney's fees, and having the court enter an order sufficient to put future purchasers of the property on notice of the interim trail use and railbanking. This may be contrasted with our total potential monetary exposure from the rails-to-trails takings litigation, which we conservatively estimate to be $57 million, plus prejudgment interest.

CHALLENGES IN RAILS-TO-TRAILS LITIGATION

One of the unusual features of the rails-to-trails takings cases is that 8 of our 17 pending cases have been certified as class actions, which range in size from approximately 100 to 2000 claimants. Prior to the recent rails-to-trails litigation, class actions in Fifth Amendment takings litigation were virtually unheard of. This is primarily because the Supreme Court has repeatedly recognized that takings analysis is highly fact-specific and ad hoc.

In our experience, this is equally true of the analysis in the rails-to-trails context, i.e., liability in rails-to-trails cases turns on the specific language of each individual deed conveyance, while damages analysis will depend on the specific physical characteristics of each individual property interest. Nevertheless, several federal district courts have certified "opt-out" rails-to-trails takings class actions. An "opt-out" class is one in which all landowners abutting a right-of-way are automatically included in the class, unless they affirmatively "opt-out." In contrast to the "opt-in" classes allowed by the U.S. Court of Federal Claims (the court with exclusive jurisdiction over all takings claims in excess of $10,000), "opt-out" classes in the rail-to-trails takings context present special problems. They require that the takings claims be evaluated en masse and in the abstract, which is nearly impossible and creates significant added complications, cost and delay.

In addition to the challenges presented by defending "opt-out" class actions, there are other challenges presented by rails-to-trails litigation more generally. They include:

- the lack of a client federal agency that is authorized to maintain an inventory of corridors that have been railbanked, monitor trail development, or otherwise track deeds in connection with trail conversion;

- uncertainty over who owns the railbanking and interim trail use easement and the United States' rights more generally in connection with these corridors;
- reluctance by the claimants to present proof of ownership and related deeds at the beginning of the litigation; and
- submission by claimants of appraisal reports that do not conform to standard appraisal procedures.

Each of these results in significant expenditures of time and resources, and complicates our ability to resolve cases and ensure that truly deserving landowners receive just compensation in as expeditious manner as possible.

The defense of the rails-to-trails cases poses special challenges for the Environment Division. Although the total potential monetary exposure from these cases is only about one per cent of the total potential monetary exposure of the entire takings litigation docket presently being handled by the Environment and Natural Resources Division, three of the nine attorneys assigned to our "Takings Team" devote the majority of their time to these cases, along with two others who devote a considerable portion of their time as well.

These cases require a deed-by-deed liability analysis and a parcel-by-parcel valuation analysis. Therefore, while a class action of 1,000 individuals may technically constitute just one case, they in reality must be defended as if they were 1,000 separate cases.

These cases also impose disproportionate expert witness costs. In order to determine just compensation for these cases, we must retain land appraisers who must separately analyze each parcel of land and provide an opinion of value for the property interest taken. The costs of these appraisals, can, and frequently do, exceed the value of the land being appraised. Thus, we increasingly are being called upon to spend more to defend these cases than we might pay out in just compensation. Nor could this money be saved by settling the cases, as we would still need some sound justification for any settlement amount. As our existing cases progress toward the damages phase, we expect this problem to continue. Therefore, we must make careful use of our resources to avoid exhausting our division's expert witness budget.

CONCLUSION

The Rails-to-Trails Program is an important and valuable federal initiative. The law that created it, however, has led to time-consuming and resource-intensive litigation. We anticipate that the number of cases will continue to rise, and we look forward to working with you on proposals to expedite and streamline the handling of these cases.

Thank you for the opportunity to raise these issues with you. I would be happy to answer questions you might have.

Mr. BARR. Thank you very much,

Mr. Sansonetti.

Mr. Ackerson, you are recognized for 5 minutes, please.

STATEMENT OF NELS ACKERSON, CHAIRMAN, THE ACKERSON GROUP, CHARTERED

Mr. ACKERSON. Thank you, Chairman Barr and Members of the Committee. As a lawyer representing home owners, ranchers, farmers, and other land owners across the United States in claims for compensation for their property, I'm pleased to offer my observation on an area of extravagantly wasteful litigation.

Both taxpayers and land owners are paying far too great a price for lawsuits when land has been taken by the Federal Government for trails. One of the Justice Department's own attorneys has written that in this area of the Fifth Amendment, it appears to protect only wealthy land owners. The process cries out for justice and common sense.

The Department of Justice, having the benefit of very little guidance from Congress, has adopted practices that I consider to be unrestrained litigation, uncontrolled expenditures, and unending disputes with land owners whose property has been taken for trails.

Congress has established no procedures to rein in this inefficient process that is unfair to land owners and taxpayers alike.

Unlike other areas of Government takings, when land is taken for a trail, there is no established system for compensation to the land owners; no process for the Government to make a good-faith offer; no established appraisal or valuation system; no grievance process; and no remedy for the land owner, other than full-scale litigation under the Tucker Act.

The Department of Justice has compounded the cost and inefficiency of this poorly conceived process by aggressively litigating every issue with every land owner, sometimes over and over again, and sometimes the same issue several times in the same litigation. Since the Government ultimately must pay the land owners' attorneys' fees, as well as the Justice Department's own fees and costs, everybody loses by this prolonged litigation.

An example of this wasteful process is the litigation involving Paul and Patricia Preseault of Burlington, Vermont. The Preseaults own what they believe—and I agree—is one of the most beautiful urban spots in Vermont: a heavily-wooded property near the heart of Burlington, overlooking Lake Champlain.

What has been little noted is that in the early 1980's the Preseaults offered to give the land for an 8-foot trail to the City of Burlington, but the city refused because it wanted something wider than 8 feet. Eight feet is what the city now has, as a result of the taking by the Federal Government on February 5th, 1986. At that time, the Government authorized the taking of that strip, that is approximately one-fourth mile in length, through their property.

On May 22nd of 2002, about a month ago—some 16 years after that original take, and after prolonged litigation—the Court of Federal Claims ordered the Government to pay the Preseaults $234,000, plus interest, from 1986, for a total of approximately $552,000, for the value of the land taken. And in addition, the Government must reimburse Mr. and Mrs. Preseault's reasonable attorneys' fees of $894,855.60. The United States will write a check for more than $1,446,000.

In addition, the Government's lawyers have expended time and costs that appear to be nearly the same amount as the Preseaults' attorneys' fees. So the total cost to the Government may be more than $2,500,000, for the quarter-mile trail.

As bad as that bill is for the taxpayers, the taxpayers are not getting as bad a deal as the Preseaults. They have had to spend huge amounts of money—their own money advanced—devote thousands of hours of their own time to the process, and disrupt their lives. After all that, the attorneys' fees that the Federal Court of Claims ordered to be paid are 20 percent less than what the Preseaults have paid, or are obligated to pay. As of today, the time of the filing of the notice of appeal has not expired. And if the Government appeals, more years of litigation may lie ahead for the Preseaults before they receive any reimbursement of their attorneys' fees or payment for their land.

Why did the Preseaults' litigation take so long and cost so much? Some of my written testimony contains some examples of that. Other examples, however, can be found in class actions. My firm also represents many land owners in both individual and class ac-

tions for compensation for trails takings under the Little Tucker Act.

The Little Tucker Act permits land owners to file claims for no more than $10,000 apiece in the Federal courts where their land is located, rather than in the Court of Federal Claims in Washington, D.C. The advantage of filing small claims as a class action, rather than in individual lawsuits, is obvious in this situation. With only $10,000 or less at stake, what land owners could afford to hire specialized counsel at their own expense to litigate claims in Washington, D.C.?

From the Government's perspective, class action should afford an efficient way to resolve thousands, or hundreds of thousands, of claims on trail-wide or State-wide bases, in a single proceeding; thus reducing litigation costs for everyone. However, the Department of Justice has not seen class actions as a benefit, but as a threat, because it makes remedies more readily available to land owners with legitimate claims.

It is disturbing that we have a legal void in which the taxpayers' and the citizens' own Justice Department considers its necessary objective to be to frustrate the compensation of just claims by opposing an efficient system of recovery. Class actions in which my firm has represented land owners have been certified in Federal courts in Idaho, Indiana, Iowa, Nebraska, and Texas. In my written testimony, there's a summary of some of the procedural road blocks—including repetitive litigation of the same issues—that have characterized too much of that litigation.

The vigorous defenses and arguments raised in each case exemplify the Department of Justice practice of aggressively opposing, or raising in some cases every conceivable legal and procedural issue; thereby driving up the cost of these takings cases. A Justice Department attorney explained in a "Law Review" article that he wrote as a student that owners who bring a takings claim under the Tucker Act usually wait at least 2 years before their cases are heard, and few property owners can afford the protracted court battle that can take over a decade.

I think my time has expired, but the point that needs to be made in both the class action litigation and in individual litigation on behalf of land owners is, there should be incentives to settle or to find a basis for a reasonable compensation for the land owners early in the process, so that it can be achieved speedily without great cost either to the Government or to the land owners.

My clients, and the tens of thousands of others who have been similarly affected, do not want years of lawyers' fees and litigation. They want only simple justice, and a fair and sensible way to obtain just compensation for their land. Their Government should want exactly the same thing.

[The prepared statement of Mr. Ackerson follows:]

PREPARED STATEMENT OF NELS ACKERSON

Mr. Chairman and Members of the Committee, I am pleased to offer my observations on an area of extravagantly wasteful litigation. Both taxpayers and landowners are paying far too great a price for lawsuits when land has been taken by the Federal Government for trails. This area cries out for common sense.

The Department of Justice has adopted a process of unrestrained litigation, uncontrolled expenditures, and unending disputes with landowners whose property has

been taken for this purpose. The Congress has established no procedures to rein in this inefficient process that is unfair to landowners and taxpayers alike.

Astonishingly, unlike other areas of government takings, when land is taken for a trail, there is no established system for compensation to the landowners, no process for the Government to make a good faith offer, no established appraisal or valuation system, no mediation or grievance process, and no remedy for the landowner other than full-scale litigation under the Tucker Act. The Department of Justice has compounded the cost and inefficiency of this poorly conceived process by aggressively litigating every issue with every landowner over and over again. Since the Government ultimately must pay the landowners' attorneys fees as well as the Justice Department's own fees and costs, everybody loses.

I have the privilege of representing many homeowners, families, farmers, ranchers, retirees, businesses, both rural and urban, and even units of government, all across the nation who have had their land taken for trails.

An example of this wasteful and unfair process is the litigation involving Paul and Patricia Preseault of Burlington, Vermont. The Preseaults own what they believe—and I agree—is some of the most beautiful property in Vermont, a heavily wooded urban property near the heart of Vermont overlooking Lake Champlain. On February 5, 1986, the Government authorized the taking of a strip of land about one fourth of one mile in length and approximately eight feet in width for a trail through that property. On May 22, 2002, some sixteen years later, after prolonged litigation, the Court of Federal Claims ordered the Government to pay the Preseaults $234,000 plus interest from 1986, for a total of approximately $552,000, and in addition the Government must reimburse Mr. and Mrs. Preseaults' reasonable attorneys' fees of $894,855.60. The United States will write a check for more than $1,446,000.

In addition, of course, the Government's own lawyers have expended time and costs that appear to be nearly the same amount as the Preseaults' attorneys' fees. If that amount is added, the estimated cost to the Government may be $890,000 more for a total cost of more than $2,500,000

As bad as that bill is to the taxpayers, theirs is not as bad a deal as the Preseaults'. For more than a decade they had to spend huge amounts of money, devote thousands of hours of their time to this process, and disrupt their lives. After all that, the attorneys' fees that the Court of Federal Claims ordered to be paid are twenty percent less than the Preseaults' have paid or are obligated to pay. As of today, despite the Court's order, Mr. and Mrs. Preseault have not been paid anything for their land or their expenses. The time for filing notice of an appeal has not expired, and if the Government appeals, more years of litigation may lie ahead before any payment is received. What a price the Preseaults have paid to exercise their constitutional right to just compensation for the land their Government took from them.

Why did the Preseaults' litigation take so long and cost so much. Following is a case study that shows some of the reasons.

A CASE STUDY OF RAILS-TO-TRAILS LITIGATION:

PRESEAULT V. UNITED STATES

History & Status	Years of Litigation	Damages for the Taking	Plaintiffs' Fees & Expenses	DOJ's Time & Expenses
Liability established Feb. 1996. Damages established May 2002.	12 +[1]	$234,000	$1,430,000[2] Total fees incurred, including pro bono fees. Court awarded $894,855.60.	~80% of Plaintiffs' billed time;[3] expenses are more than $130,000

DEPARTMENT OF JUSTICE ("DOJ") LITIGATION STRATEGY

- **The DOJ argued and lost a "railbanking" issue four separate times:** In 1996 the Federal Circuit ruled that the subject right of way was merely eight feet wide and was not "railbanked" for railroad purposes. The DOJ did not appeal that ruling. In the summer of 2000, winter of 2001, and May of

2001, the DOJ again advanced theories of the case based on the premise that the trail was railbanked. Each time the Court rejected the DOJ's argument. **Estimated Plaintiffs' fees and expenses on this issue alone** not **including first round of arguments: $40,000. Estimated DOJ fees and expenses: $80,000.**

- **The DOJ litigated damages to judgment where primary experts for each party were at a mean value of $222,000 and court ultimately found damages to be $234,000:** In the final months before trial, the DOJ presented its primary appraiser's opinion that damages for the taking were approximately $115,000. Plaintiffs' primary appraiser opined that the value was $325,000. The DOJ made no effort to settle the difference and litigated the matter to trial. The court awarded $234,000 in damages plus compound interest from 1986 (for a total value in excess of $500,000). **Estimated Plaintiffs' fees and expenses for five months of trial preparation and trial: $400,000. Estimated DOJ fees and expenses: $400,000.**
- **The DOJ demands greater level of proof and expenses—sometimes for items in the hundreds of dollars—than is typically required as a business practice in the legal community. Establishing that proof often requires thousands of dollars worth of fees that are fully compensable under the law:** Rather than arriving at compromises or merely conceding items such as copying or travel expenses, the DOJ demands itemized proof for all items. Case law shows that this level of proof is not required, and the work involved in the demands for proof drives up the costs of litigation for both parties.
- **The DOJ criticizes counsel for billing in quarter-hour increments, although review of DOJ gross time records shows that in most cases, if not all, the DOJ appears to be billing in quarter-hour increments; if DOJ raises objections to court, Plaintiffs' counsel must take time to research law and defend practice.**
- **The DOJ position is that fees and expenses should never be 100% reimbursable despite law that landowners are to be made whole in reimbursement for fees and expenses for the taking of property.**
- **The DOJ defense of this single takings claim for property worth $234,000 will cost in excess of $2,800,000? excluding the value of the taking:** If the claim had been settled shortly after it was brought in 1990, there would have been savings of approximately $230,000 in interest, $1,300,000 in Plaintiffs' fees and expenses, over $130,000 in DOJ expenses for experts alone, and an estimated $925,500 in DOJ fees. [4]
- **To date, sixteen years after the taking and six years after liability was established, the Plaintiffs have not received a dime.**

CLASS ACTION EXPERIENCE

My firm represents landowners in both individual and class action cases for compensation for trails takings under the Little Tucker Act. The Little Tucker Act permits landowners to file claims for no more than $10,000 apiece in the federal courts where their land is located, rather than in the Court of Federal Claims in Washington, DC. The advantage of filing small claims as a class action rather than in individual lawsuits is obvious. With only $10,000 or less at stake, what landowners could afford to hire specialized counsel at their own expense to litigate claims in Washington, DC? Only by aggregating claims in a single class action is it likely that any landowner will find a lawyer willing to take their case on a contingency basis.

From the Government's perspective, class actions should afford an efficient way to resolve hundreds or thousands of claims on a trail-wide or a statewide basis in a single proceeding, thus reducing litigation costs for everyone. However, the Department of Justice has not seen class actions as a benefit but as a threat because it may make remedies more readily available to landowners with legitimate claims. It is disturbing that the taxpayers' own Justice Department considers its objective to be to frustrate the compensation of just claims by opposing efficient systems of recovery.

Class actions in which my firm represents landowners under the Little Tucker Act have been certified in federal courts in Idaho, Indiana, Iowa, Nebraska, and Texas. Following is a summary of the procedural roadblocks, including repetitive litigation of the same issues, that have characterized that class action litigation.

RAILS-TO-TRAILS LITIGATION:

Five Certified Class Actions

Case	Date Certified	Certification Opposed?
Hash v. United States	July 7, 2000	Yes
Schneider v. United States	July 21, 2000	Yes
Bywaters v. United States	August 25, 2000	Yes
Schmitt v. United States	March 22, 2001	Yes
Lowers v. United States	May 4, 2001	Initially, yes, but stipulated after full briefing completed

- **No material difference between each class action; the DOJ opposed class certification in each case** (see attached copies of certification orders).
- **Although Hash was the first of five cases brought by the same counsel, the DOJ knew of the certification of other materially identical classes in trails-taking cases before the Court of Federal Claims, where the standard for class certification is more stringent.** *Moore* v. *United States*, 41 Fed. Cl. 394 (1998); *Illig* v. *United States*, 1:98cv00934 (Ct. Fed. Cl., Feb. 14, 2000). **In addition, by July 2000, there was a great deal of precedent for certifying class actions brought by landowners based on railroad right-of-way abandonments.**
- **The general policy of vigorously opposing class certification failed to appreciate the enormous benefits of resolving takings issues on a trail-wide or state-wide basis. Significant efficiencies are achieved by avoiding the Preseault-model of separately litigating damages, expenses, and fees for each individual claim along a right-of-way taking.**

The vigorous defenses and arguments raised in each case exemplify the general Department of Justice policy of aggressively opposing or raising every conceivable legal and procedural issue, thereby driving up the costs of these takings cases.

But for the availability of counsel willing to shoulder takings cases on a contingency basis, most landowners would have no remedy as a practical matter due to the staggering costs of bringing a claim. As noted by a former law student who is now counsel for the Department of Justice on some of these cases:

The Congressional Budget Office states that owners who bring [a takings claim under the Tucker Act] usually wait at least two years before their cases are heard, and few property owners can afford the protracted court battle that can take over a decade. . . . The complexity of these cases and the length of time that even victorious plaintiffs must wait to receive their compensation creates the impression that the Fifth Amendment effectively protects only wealthy landowners. In fact, cases are usually brought only for claims over $100,000. One rationale for enacting takings legislation is to remove this functional bar and give "small landowners who cannot afford a trip to the Supreme Court a chance to get their civil rights." David Spohr, Note, *Florida's Takings Law: A Bark Worse Than Its Bite*, Va. Envtl. L.J. 313, 322 (1997).

Both governmental and private interests would be served by a less litigious Department of Justice strategy, and Congress should devise a system that makes a claims process available to any injured party, not just those who can afford expensive, protracted battles with the Department of Justice. Rather than fostering litigation, the Department should be developing settlement strategies that will fairly and efficiently place values on properties and offer prompt and efficient recoveries to landowners who accept Government offers. Where the Government has undertaken a program to take property for public use, the Department of Justice need not feel compelled to defend against the legitimate claims of every landowner who lawfully seeks the just compensation that the Constitution requires.

Not all of the blame can be placed on the Department of Justice, however. Although the Department of Justice could be and should be offering settlement alternatives to litigation once a Tucker Act case has been filed, the fact is that under present law the Government cannot make such an offer before litigation is commenced. It can only wait to be sued and then either settle or litigate.

Unlike other areas of organized federal takings, there is no condemnation procedure when land is taken for trails. Therefore there is no statutory framework to notify and explain rights or procedures to these landowners. There is no procedure to offer fair market value as is required in a typical condemnation case. Instead, the landowners are required as the first and essential step to engage their own government in protracted and expensive litigation. Compensation procedures are required for virtually every federal land acquisition, such as construction of facilities for national defense and security, government buildings, urban renewal, highways, schools, hospitals, parks and even relocation of railroads. The same can be done and should be done for trails conversions.

My clients and the tens of thousands of others that have been similarly affected do not want years of lawyers' fees and litigation. They want only simple justice and a fair and sensible way to obtain just compensation for their land. Their Government should want exactly the same thing, but that is what their Government denies them.

END NOTES

1. In addition, pre-Court of Federal Claims litigation lasted nine years—from 1981 through 1990.
2. This amount excludes expenses and fees settled earlier in litigation with one of plaintiffs' previous counsel. Plaintiffs dismissed counsel requesting those fees. Subsequently, when that counsel submitted a request for those fees and expenses, his submission was criticized by the court and the Government as being grossly excessive. The settlement for those fees was for $46,000.
3. The calculations are based on comparing total hours spent by all plaintiffs' attorneys and total hours spent by the DOJ during the same time period—February 1990 through June 2001—but exclude the hours billed by both parties during the period of work performed by counsel identified in footnote 2.
4. This figure is based on 3,085 hours invested as of June 2001 by the DOJ, multiplied by an average hourly rate of $300 per hour. In addition, litigation is ongoing and both parties continue to accumulate fees.

Mr. BARR. Thank you very much, Mr. Ackerson.

Ms. Ferster, you are recognized for 5 minutes, please.

STATEMENT OF ANDREA FERSTER, GENERAL COUNSEL, RAILS TO TRAILS CONSERVANCY

Ms. FERSTER. Mr. Chairman, Members of the Subcommittee, thank you for inviting the Rails-to-Trails Conservancy to testify at today's oversight hearing. My name is Andrea Ferster. I'm General Counsel to the Conservancy. The Conservancy is a national, nonprofit organization, whose mission is to create a nation-wide network of public trails from former rail lines and connecting corridors.

There have been a number of oversight hearings on the Rails-to-Trails program over the years, and a common message sounded in each hearing is the value that rail-trails bring to America's communities and countrysides. Rail-trails provide a safe and convenient place for families to build walking, jogging, or bicycling into their daily lives. And they are specifically referenced in the President's new initiative just announced today to combat the major public health epidemic associated with the increase in obesity among Americans.

The Rails-to-Trails program was initiated more than 20 years ago, when Congress realized that our nation's built rail infrastructure was at risk of being irreparably destroyed as railroads began

to abandon corridors at alarming rates. Like "Humpty-Dumpty," it's nearly impossible to put a railroad corridor together again, once it is abandoned; sold; fragmented; and bridges, tunnels, and other costly structures destroyed.

Our national policy favoring rail corridor preservation appropriately recognizes that our national rail system—which was painstakingly created over several generations, using State or Federal land grants, loan guarantees, and powers of eminent domain—represents a substantial public investment that must be preserved for continued transportation use.

The curtailment of national air travel following September 11th tragically demonstrated the importance of rail corridor preservation efforts as a way to achieve needed redundancy in our national transportation network. The centerpiece of this national policy is section 8(d) of the National Trails System Act, referred to as the "Railbanking Law," which was passed by Congress and signed into law by President Reagan in 1983.

The Railbanking Law requires the Surface Transportation Board, which is the successor to the former Interstate Commerce Commission, to maintain jurisdiction over rail corridors where there is a voluntary trail management agreement between the railroad and a qualified trail sponsor who then maintains the corridor as a trail until such time as the corridor is once again needed for active rail service. Any conflicting ownership claims to the use of these rights-of-way are preempted, so long as these corridors remain in this national rail bank.

Our written testimony addresses in detail the issue of litigation in the Rails-to-Trails program, which is the subject to today's hearing. Much of the pending litigation involves claims brought by persons seeking compensation from the Federal Government based on a perception—which is often unsubstantiated—that the rail corridor would have reverted to them upon the cessation of active rail service.

The door to the filing of these claims was opened in 1996, when the U.S. Court of Appeals for the Federal Circuit, sitting en banc, decided on its own initiative to vacate a decision of a three-judge panel, in Preseault versus the United States, which had found that the Railbanking Law did not affect the taking of an adjacent land owner's right to a Burlington, Vermont rail-trail.

Because the decision was not adopted by a majority of the Federal Circuit, the decision has no precedential value. But ultimately, the Federal Circuit did decide that a taking had occurred. The Rails-to-Trails Conservancy strongly disagrees that the reasoning of that decision should be extended beyond the unique facts of the Preseault case. And we would certainly urge that the Justice Department seek further review of this reasoning at the next earliest opportunity.

Despite the result in the Preseault case, there's still no indication that other compensation cases involving rail-trails will pose an undue burden on the Federal Treasury. Apart from the Preseault case itself, which involves a factually anomalous set of circumstances that likely affected the outcome and is unlikely to occur again, and cases involving claims that are too small to litigate, there is no certainty that compensation will be awarded in any of

the other pending cases; particularly if all avenues for judicial review of initial decisions are pursued.

Also, the pace of railroad abandonments has significantly slowed, and the statute of limitations has run for many railbanking orders. As a result, with each passing year, there is a shrinking pool of railbank corridors that can be the subject of a compensation case.

While predictions can be risky, it appears that the annual financial liability of the Federal Government will continue to be de minimis. As the Justice Department's written testimony indicates, the total potential monetary exposure of these cases is about 1 percent of the entire takings litigation docket of the Environment and Natural Resources Division. And the actual pay-out has been, to date, much less.

While we are sympathetic to, and very appreciative of, this significant effort that Justice Department attorneys have devoted to the defense of this program, we think that this internalized cost is more than justified by the important goals achieved by this program. And we also believe that these internalized costs will become less, as the litigation becomes more efficient.

In short, we do not feel that there is any cause at this point to make any changes to this important and highly effective law. Thank you.

[The prepared statement of Ms. Ferster follows:]

PREPARED STATEMENT OF ANDREA FERSTER

INTRODUCTION

Thank you for allowing Rails-to-Trails Conservancy (RTC) the opportunity to testify at the oversight hearing on "Litigation and its Effect on the Rails-to-Trails Program." Rails-to-Trails Conservancy is a national nonprofit conservation organization founded in 1985. The mission of Rails-to-Trails Conservancy is to enrich America's communities and countrysides by creating a nationwide network of public trails from former rail lines and connecting corridors. Specifically, RTC identifies rail corridors that are not currently needed for rail transportation and facilitates their preservation and continued public use through conversion into public trails and non-motorized transportation corridors. We have more than 100,000 members nationwide, and field offices in California, Florida, Michigan, New England, Ohio, and Pennsylvania.

LEGISLATIVE BACKGROUND OF FEDERAL RAILBANKING PROGRAM

In 1976, Congress recognized the need to create a "national rail bank" of railroad corridors as a way of ensuring that our nation's built rail corridor infrastructure, which was frequently assembled at great public cost through state or federal land grants or loan guarantees and powers of eminent domain, remained dedicated for transportation purposes, although these corridors were not needed for present or foreseeable future railroad operations. The Railroad Revitalization and Regulatory Reform Act of 1976 (4–R Act)[1] provided for mandatory transfers of corridors proposed for abandonment to other carriers, and directed the Interstate Commerce Commission (ICC), which regulates railroad abandonments, to impose conditions barring the disposition of railroad rights of way for 180 days in order to allow for possible transfers for public use, including for trails.[2]

Notwithstanding these regulatory tools, the declining fortunes of the rail industry began to result in an increasing loss of railroad corridor through abandonment. Then in 1980, Congress passed the Staggers Rail Act,[3] which required the ICC to exempt most rail abandonments from regulation. As a result, the rate of rail aban-

[1] Pub. L. No. 94–210, 90 Stat. 31
[2] *See* 49 U.S.C. §§ 10905, 10906.
[3] Pub. L. No. 96–448, 94 Stat. 1895 (1980).

donments by major carriers accelerated to between 4,000 to 8,000 miles per year.[4] This alarming rate of rail abandonments made corridor preservation a critical issue of national policy.

Once the ICC granted abandonment authorization, the railroad was free to remove the tracks and ties, sell the right of way piecemeal to private owners, or simply allow the right of way to be claimed by adjacent landowners. Our nation's rail corridor system, "painstakingly created over several generations," was at risk of becoming irreparably fragmented due to the present high cost of land and the difficulties of assembling right-of-way in our increasingly populous nation.[5] Today, it would be virtually impossible to recreate this system once the right of way is fragmented, and bridges, tunnels and other costly structures destroyed.

Alarmed by the potential loss of this valuable national resource, Congress began to look for ways to facilitate the preservation of these corridors for alternative public transportation uses, without interfering with the ability of the financially-beleaguered railroad industry to shed duplicative or unprofitable lines. The possibility of transferring these surplus rights of way to third parties for use as trails began to emerge as an efficient method of preserving these corridors.

However, efforts by potential trail managers to purchase corridors that had received ICC abandonment authorization for public use as trails faced a number of difficulties. The biggest difficulty was the faulty perception by many adjacent landowners that an ICC order authorizing a railroad to abandon its common carrier obligations also meant that the railroad had abandoned its property interest in the right of way itself under state law. With state law ill-equipped to address this new animal called a "rail-trail," trail opponents began to institute legal actions against the railroad and the new trail manager to determine the ownership of the right of way. Defending against this litigation proved costly and time consuming, and was a significant disincentive to rails-to-trails conversions.

SECTION 8(D) OF THE NATIONAL TRAILS SYSTEMS ACT

Section 8(d) of the National Trails System Act is the legislative centerpiece of the federal "Rails to Trails Program." This law was enacted by Congress and signed into law by President Ronald Reagan in 1983 to provide an effective mechanism for preserving railroad rights-of-way for future rail service and for energy efficient alternative transportation use, without imposing additional burdens on rail carriers. The law allows railroads to transfer inactive railroad corridors to qualified trail managers for interim use as trails, until such time as these rights-of-way are needed for future rail service on the condition that trail managers assume all carrying costs (liability, maintenance, and taxes) of the rights of way. By pairing railbanking with interim trail use, Congress created a mechanism that allows for the preservation of our nation's built rail corridor infrastructure for future railroad purposes without burdening the railroads with unwanted property or the communities through which these corridors run with vacant and derelict land. This process is known as "railbanking."

Section 8(d) (the Railbanking Law) facilitated rails-to-trails conversions by preserving the jurisdiction of the ICC (now called the Surface Transportation Board, or STB) over inactive railroad corridors that were dedicated to interim trail use and subject to future reactivation of rail service. At the same time, the Railbanking Law created an incentive for railroads to enter into interim trail use/railbanking negotiations by allowing the railroad to liquidate its entire interest in the rail line where a qualified governmental or private organization agreed "to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way."[6]

A key feature of the Railbanking Law is its continuation of the STB's pre-emptive jurisdiction of conflicting state law during the "railbanking" period during which the right of way is managed as an interim trail. Normally, the STB's preemptive authority is terminated once the railroad petitions to "abandon" its common carrier obligation and the STB finds that abandonment does not interfere with the "public convenience and necessity." Once such abandonment authorization is consummated by the railroad, state law principles may apply to divest the railroad of any ability to transfer the corridor for uses other than active railroad service. As the legislative history of the federal railbanking law explains, "The concept of attempting to establish trails only after the formal abandonment of a railroad right of way is self-de-

[4] Association of American Railroads, Railroad Facts (1992).
[5] *See Reed* v. *Meserve*, 487 F.2d 646, 649–50 (1st Cir. 1973).
[6] 16 U.S.C. § 1247(d).

feating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." The federal railbanking law solves this problem by continuing the STB's pre-emptive jurisdiction over the corridor where a voluntary agreement between the railroad and a trail manager in which the trail manager agrees to assume all legal and financial responsibility for maintaining the corridor.

The ICC issued rules interpreting the Railbanking Law in 1986.[7] Under these rules, an interested trail manager could request a railbanking order from the STB within 30 days after the railroad files an application for an abandonment (or, in the case of "exempt abandonments," within 10 days of publication of a Notice of Exemption in the Federal Register).[8] If the request is filed by a qualified entity who is willing to assume all legal and financial responsibility for the corridor, and the railroad agrees to enter into negotiations for an interim trail use/railbanking agreement with the entity, the STB issues a Certificate of Interim Trail Use ("CITU") or, in the case of "exempt abandonments," a Notice of Interim Trail Use ("NITU").[9] Issuance of a NITU or CITU allows the railroad to discontinue service, cancel tariffs, and salvage track and material consistent with interim trail use and railbanking.[10] If an interim trail use/railbanking agreement is not reached within 180 days, or any extensions thereof, the railroad is permitted (but not obligated) to fully abandon the corridor.

The Railbanking Law has, in fact, been serving its intended function of preserving inactive railroad corridors intact for public use. Since the program's inception in 1983, the ICC/STB has issued 398 railbanking orders, resulting in the acquisition of 180 railbanked corridors in 30 states representing 3,983 miles. Some 1,552 miles of railbanked corridors are presently open trails, with an additional 1,834 miles of trail under development on railbanked corridors.[11] However, the availability of railbanking as a mechanism for corridor preservation depends on historic timing, railroad cooperation, and other factors. As a result, the majority of the 11,600 miles of rail-trails are not part of the national railbank, and have been privately acquired by state and local governments or park districts without the issuance of a railbanking order by the STB. These trail managers are under no obligation to preserve these corridors for future rail service, and are vulnerable to "quiet title" lawsuits challenging the ownership of these corridors.

The Railbanking Law has in fact assisted in preserving railroad corridors for active rail use. For example, in 1993, ICC approved the reactivation of a corridor in Ohio that had been railbanked in 1990.[12] Moreover, many more jurisdictions throughout the country have acquired and railbanked rail corridors for future use as light rail, commuter rail, and transit lines. Examples include the Placerville Branch outside of Sacramento, Montgomery County, Maryland, and Madison County, Illinois. Without the Railbanking Law, these corridors would likely have been lost for future rail transportation use.

RAILBANKING IN THE COURTS

Litigation has played an important role in clarifying and interpreting the authority of the ICC/STB to implement the federal Railbanking Law. The ICC's rules and implementation of the Railbanking Law were the subject of early litigation by both proponents and opponents of railbanking. In response to challenges filed by trails groups, who asserted that railbanking was mandatory when a trail group agreed to assume all carrying costs, the courts upheld the ICC's interpretation of the Railbanking Law as authorizing only voluntary transactions between railroads and trails groups as a reasonable interpretation of the statute.[13] In 1990, the U.S. Supreme Court unanimously upheld the Railbanking Law as a valid exercise of Congress' power under the Commerce Clause of the U.S. Constitution in *Preseault* v. *ICC*, stating "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable."[14]

The treatment of railbanking as a voluntary program has limited the number of rail corridors that are preserved for future use. For example, railroads were extremely reluctant to participate in the program until 1990, when the U.S. Supreme

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[7] *See Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986).
[8] 49 C.F.R. § 1152.29(b).
[9] *Id*. § 1152.29(d)(1).
[10] *Id.* §§ 1152.29(c), (d)(1).
[11] Statistics compiled by RTC researcher Darren Smith from STB records, as of June 15, 2002.
[12] *Norfolk and Western Railway Co.—Abandonment Between St. Mary's and Minster in Auglaize County, OH*, Dkt. No. AB–290 (Sub-No. 68), 9 I.C.C.2d 1015 (1993).
[13] *National Wildlife Federation* v. *ICC*, 850 F.2d 695 (D.C. Cir. 1988).
[14] *Preseault* v. *ICC*, 494 U.S. 1, 19 (1990).

Court upheld the constitutionality of the program, resulting in the loss of between 25,000 and 50,000 miles of rail corridor. While railroad participation has significantly improved since 1990, many corridors continue to be lost due to railroads' refusal to participate in the program. Railroads have intentionally broken up corridors to ensure that future, potentially profitable lines are not available for rail service reactivation by future competitors. A few unscrupulous railroads have even used the voluntary nature of the program as a way of creating a bidding war between the proposed interim trail manager and adjacent property owners.

Trail opponents have also filed a number of challenges in an attempt to curtail the authority of the STB to issue railbanking orders.[15] The courts have rejected efforts by trail opponents to add burdensome procedural requirements to the railbanking process.[16] The courts have also uniformly rejected efforts by trail opponents to attack railbanking orders indirectly through challenges to an interim trail manager's ownership or use of a railbanked corridor.[17] This litigation has been successful in clarifying the authority of the STB (and the limits on the STB's authority) to issue orders under the Railbanking Law. As a result, there are at present very few petitions directly challenging the STB's authority to issue railbanking orders.

COMPENSATION CLAIMS

Litigation over whether and under what circumstances the railbanking program effects a compensable "taking" of property, however, remains ongoing. In *Preseault* v. *ICC*, the U.S. Supreme Court declined to address whether the railbanking of the trail represented a "taking" of property interests without just compensation, in violation of the Fifth Amendment.[18] Instead, the Court held that such "takings" claims must be brought in the U.S. Court of Federal Claims pursuant to the judicial review mechanism for asserting claims against the federal government specified by the Tucker Act.[19] For persons asserting claims not exceeding $10,000, concurrent jurisdiction exists in the federal district courts under the "little Tucker Act."[20]

Several compensation claims were then filed against the U.S. government by trail opponents in the U.S. Claims Court (now called the U.S. Court of Federal Claims). In 1992, the Claims Court ultimately ruled in *Preseault* v. *United States* that the Railbanking Law did not effect a taking of any property interest.[21] The decision was initially upheld by a three-judge panel of the U.S. Court of Appeals for the Federal Circuit in 1995. This decision, however, was subsequently vacated by the Federal Circuit, sitting *in banc*, and a new decision was subsequently issued by the full Federal Circuit in 1996, reversing the Claims Court.[22] A plurality (not a majority) of the Federal Circuit then held that the Railbanking Law resulted in a per se taking, under the specific facts of that case. A concurring opinion joined by two judges agreed with the result (but not necessarily the reasoning) of the plurality, and three judges signed onto a dissenting opinion. As a result, the court's plurality decision has no precedential value. Indeed, the reasoning in the plurality decision is inconsistent with other Federal Circuit cases.[23] Nonetheless, the plurality decision, at least for the time being, establishes the jurisprudence governing the adjudication of compensation cases arising from the Railbanking Law.

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[15] *Fritsch* v. *ICC*, 59 F.3d 248 (D.C. Cir. 1995), *cert. denied, sub. nom CSX Transportation* v. *Fritsch*, 116 S.Ct. 1262 (1996); *Birt* v. *ICC*, 90 F.3d 580 (D.C. Cir. 1996).

[16] *National Ass'n of Reversionary Property Owners* v. *ICC*, C.A. No. 94–1581 (D.C. Cir., Nov. 3, 1995).

[17] *See, e.g., Dave* v. *Rails to Trails Conservancy*, 863 F. Supp. 1285 (E.D. Wash. 1994), *aff'd*, 79 F.3d 940 (9th Cir., 1996); *Grantwood Village v. Missouri Pacific Railroad Co.*, 95 F.3d 654 (8th Cir., 1996), *cert. denied*, 117 S. Ct. 1082 (1997).

[18] *See Preseault* v. *ICC*, 853 F.2d 145 (2d Cir. 1988); *Glosemeyer* v. *ICC*, 879 F.2d 316 (8th Cir. 1989), *cert denied*, 494 U.S. 1003 (1990).

[19] *See* 28 U.S.C. § 1491.

[20] *See* 28 U.S.C. § 1346(a)(2).

[21] *Preseault* v. *USA*, 27 Fed. Cl. 69 (1992).

[22] One question that has yet to be answered is why the full Federal Circuit decided to review the panel decision in *Preseault*, on its own motion and long after the time for requests for rehearing had expired. After the decision, it was revealed in the media that a number of the Federal Circuit judges who participated in the *Preseault* case had previously attended an all-expense paid "seminar" on property rights and the environment at resorts in Montana, which had been underwritten by the same foundation that was also funding the *Preseault* litigation. *See Washington Post*, "Issues Groups Fund Seminars for Judges" (April 9 1998).

[23] *See California Housing Securities, Inc* v. *United States*, 959 F.2d 955 (Fed. Cir. 1992) (rejecting savings and loan institution's taking claim based on physical seizure of institution's assets by the Resolution Trust Company pursuant to federal regulations designed to safeguard institution's assets); *Golden Pacific Bancorp.* v. *United States*, 15 F.3d 1066 (Fed. Cir., 1994) (same).

The plurality decision by the Federal Circuit held that, under Vermont law, the railroad easement would have reverted to the adjacent property owners but for the application of the Railbanking Law.[24] The plurality decision, however, made clear that the federal government was solely responsible for the payment of any compensation owned. The Justice Department opted not to petition for Supreme Court review of the case, in part because no final judgment had been reached by the court. The case was remanded to the Claims Court for a determination of the amount of compensation owed by the federal government.

The Federal Circuit's 1996 plurality decision in the *Preseault* case opened the door to the filing of cases by persons alleging that the railbanking program effected an uncompensated "taking" of their property interest in a railbanked corridor. There are now approximately 22 compensation cases pending in trial courts around the country and in the U.S. Court of Federal Claims, in different phases of litigation. Thus far, compensation has been awarded in one case, *Preseault* v. *U.S.A.*, which involves a rail-trail in Burlington, Vermont, and denied in another case, *Chevy Chase Land Co.* v. *United States*,[25] a compensation claim involving the Capital Crescent Trail in Montgomery County, Maryland. In addition, a few cases involving small claims have simply been settled by the Justice Department.

It is still too early to determine with any precision the financial impact of these compensation claims on the Judgment Fund, which is the source for the payment of any compensation awards resulting from the Railbanking Law. However, there is no certainty that the most of these compensation claims will result in any liability at all to the United States. As the U.S. Supreme Court pointed out in the *Preseault* case, "under any view of takings law, only some rail-to-trail conversions will amount to takings. Some rights-of-way are held in fee simple. Others are held as easements that do not even as a matter of state law revert upon interim use as nature trails."[26] This is certainly the case with respect to the more than 28,000 miles of railroad right-of-way granted by the federal or state government, to which abutting landowners have no legal right or interest. Many of the cases still pending have been filed in the federal district courts under the "little Tucker Act," which limits the amount of compensation that can be sought to $10,000 or less.

Apart from the *Preseault* case (which is unique due to the fact that the trail conversion occurred even before the passage of the Railbanking Law), liability has been found in only one case, *Moore* v. *U.S.A.*, trail-wide class action involving Missouri's Katy Trail State Park that is now entering the valuation phase. In another trail-wide class action involving Idaho's Weiser River Trail, *Hash* v. *U.S.A.*, the court has issued a memorandum of decision finding, based on a representative sample of the original deeds of conveyances to the railroad, that the railroad acquired a fee simple rather than an easement interest to the corridor, which substantially undercuts the class members' purported claims of ownership in the corridor.

Clearly, the most time-consuming aspect of the adjudication of these claims is the determination of whether the claimants possess an ownership interest in these railroad corridors under state law. The adjudication of these ownership questions typically requires a parcel-by-parcel examination of the century-old deeds by which the corridor was conveyed to the railroad, an inquiry unto the circumstances surrounding the conveyance as well as any applicable statutes in effect at the time of the conveyance, and the resolution of numerous legal and interpretative questions on which there are frequently no clear answers in state law.

Indeed, several federal courts have reacted by certifying questions of state law on which there is no clear precedent for an opinion from the state's highest court. For example, in *Chevy Chase Land Co* v. *U.S.A.*, the Maryland Court of Appeals determined in response to a set of certified questions from the federal court that, under Maryland law, the conveyance by the railroad of a rail corridor for railbanking and interim trail use was within the scope of a railroad easement under Maryland law.[27] It is worth noting that, in both of the cases in which the claimants were determined to have a compensable ownership interest in a railbanked corridor (*Moore* v. *U.S.A*, and *Preseault* v. *U.S.A.*), the courts expressly acknowledged in their decisions that there was no legal precedent that specifically addressing the question of state law presented, and that the courts would have benefitted from the views of the state courts had a certification mechanism been available.

Notwithstanding the complexity of the state law ownership issues, the litigation of compensation cases is likely to proceed more quickly now, due to the fact that most of the procedural issues involving how these claims were going to be litigated

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[24] *Preseault* v. *U.S.*, 100 F.3d 1525 (Fed. Cir. 1996).
[25] 230 F.3d 1375 (Fed. Cir., Dec. 17, 1999), *cert. denied*, 121 S. Ct. 380 (Oct. 30, 2000).
[26] *Preseault* v. *ICC*, 494 U.S. 1, 16 (1990) (citations omitted)
[27] 733 A.2d 1055 (Md. 1999).

have now been resolved, and a procedural framework for future cases has been established. For example, in September 1999, the federal district court in Kansas issued a decision in one of the early compensation cases, denying the plaintiffs' request to certify the case as a nationwide class action on behalf of persons in virtually every state claiming to possess a compensable property interest in a railbanked corridor.[28] Instead, the courts have certified a number of the cases as "trail-wide" class actions on behalf of persons asserting a claim involving a single railbanked corridor.

Moreover, despite some initial concern about the appropriateness of even a trail-wide class, the class action mechanism has in fact allowed the courts and the parties to address common questions of law affecting liability more efficiently. The courts have also consolidated a number of the cases relating to the same corridor or in the same cases, again in order to allow the courts to more efficiently resolve common question of law. As a result of cases such as *Swisher*, *Moore* and *Hash*, a framework for addressing common liability questions and for categorizing properties for valuation purposes has now been established, and the courts have addressed a whole host of other procedural issues, such as the methodology for providing notice to class members, and determining the width of the right of way for compensation purposes. It is likely that litigation of the remaining cases, as well as any future cases that may be brought, will be resolved more efficiently and quickly.

Issues that remain unresolved include that the matter of the amount of attorneys fees being sought by claimants. Successful claimants under the Tucker Act are entitled to have their attorneys fees paid by the federal government, pursuant to the Uniform Relocation Assistance and Real Property Acquisition Act.[29] However, because individual claims under the Tucker Act are limited to $10,000, the availability of court-awarded attorneys fees has led to the anomalous result, in one case, of a request for attorneys fees in the amount of $778,500 for a compensation award of $10,000, and in another case, an award of attorneys fees that exceeded the compensation awarded by nearly 400 percent. Clearly, the primary beneficiaries (and, in all likelihood, the instigators as well) of these compensation claims are not the property owners themselves but their lawyers, who have little incentive to litigate these cases in an efficient or cost-effective manner.

While predictions can be risky, it does not appear at this point that claims are being asserted in an unmanageable number. In the seven years since the Federal Circuit's plurality decision in the Preseault case, the courts have not, as some had predicted at the time, been flooded with compensation cases arising from the federal railbanking program. Instead, despite an initial flurry of filings in 1998, very few new cases are filed each year. Nor is it likely that the rate at which new compensation cases are filed will significantly increase in subsequent years. Because of the six-year statute of limitations on the filing of claims under the Tucker Act, corridors railbanked prior to 1996 can no longer be the subject of a compensation claims. Moreover, the pace of abandonments has significantly slowed, and thus, fewer railbanking orders are being issued each year. With each passing year, there is a shrinking pool of railbanked corridors that can be the subject of a compensation case.

Nor is there any indication that these claims will pose an undue burden on the federal treasury. To the contrary, it is likely that the annual financial liability of the federal government will be de minimus, particularly when compared to the judgments being paid out over other government regulatory programs. Indeed, a recent study by Tufts University found that investor suits under the pending trade bill could generate claims against the U.S. totaling $32 billion a year.[30] As a result, the number of cases as well as the annual fiscal impact on the judgment fund of any compensation awards, is likely to remain fairly manageable.

CONCLUSION

In sum, the compensation cases arising from the Railbanking Law are not presently, and are not likely to become, a financial burden to the federal treasury. While the pace of railroad abandonments is slowing, the federal Railbanking Law remains an important component of our national policy favoring rail corridor preservation. The law needs to remain in place in order to ensure that the short-term needs of private railroads do not result in the dismantling of a valuable national resource critical to our nation's long-term economic and national security/national defense

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[28] *See Swisher* v. *U.S.A.* 189 F.R.D. 638 (D. Kan. 1999).

[29] *See* 42 U.S.C. § 4654(c).

[30] Gallagher, Kevin, "The Fiscal Impacts of Investment Provisions in United States Trade Agreements," (Tufts University 2002), reprinted at www.taxpayer.net/chapter11.

needs. Indeed, the importance of rail corridor preservation efforts as a way to achieve needed redundancy in our national transportation network was tragically demonstrated by the curtailment of national air travel following September 11th. The importance of preserving our nation's built rail corridor infrastructure clearly justifies any internalized costs in defending the program in court. The Railbanking Program is not broken, and does not need fixing.

Mr. BARR. Thank you very much, Ms. Ferster.

Mayor Murphy.

Mr. MURPHY. Mr. Chairman, Congressmen, Congresswoman——

Mr. GEKAS. Mr. Chairman, point of order.

Mr. BARR. The gentleman from Pennsylvania.

Mr. GEKAS. The lady from Pennsylvania has arrived, and I would yield to her, with unanimous consent, to add to the introduction of Mayor Murphy.

Mr. BARR. The gentlelady from Pennsylvania is recognized for purpose of introductory remarks.

Ms. HART. I thank the Chairman, because I was apparently a Member of the Subcommittee until, like, yesterday, and I appreciate your indulgence to come over and introduce—almost my mayor.

I just am pleased that he's been working with Republicans and Democrats—since I'm a Republican and he's a Democrat—in our region for quite a long time. And I'm pleased that he was invited to be one of the witnesses today, because he has a lot of expertise in this area, and he has been a tireless worker and been very successful as our mayor in Pittsburgh; though I only represent the outskirts of the city.

I just hope that my colleagues will give him indulgence, and give him an opportunity to really present all he, I know, is capable of. And I thank you, Mayor Murphy, for taking the trip to come be with us. Thank you, Mr. Chairman.

Mr. BARR. The Chair thanks the gentlelady from Pennsylvania.

Mayor Murphy.

STATEMENT OF TOM MURPHY, MAYOR, PITTSBURGH, PA

Mr. MURPHY. Thank you. Mr. Chairman, Congresswoman, Congressmen, I am very honored to be here, and I feel very strongly about this issue. I believe that Rails-to-Trails provide wonderful opportunities in urban areas that often lack recreational opportunities, and in rural areas, also.

I'm not a lawyer. I am not going to get into the details of the litigation; only to point out how important it is, I believe, that we not lose sight of the forest through the trees in this issue; that this is an important issue, and it is important to work out, so that we can continue to do this.

There are wonderful examples of recreational treasures in the country that face similar kinds of opposition. The public golf course where the U.S. Open just finished faced significant opposition when it was first created; as did the C and O Canal, if you remember the story of that—much of that right-of-way being planned for a highway, and Justice Douglas taking the editor of the "Washington Post" and others on a walk of it, to convince them that it should not be a highway, but what it is today. And many of you, I'm sure, have used that.

Parks like Central Park, and Shinley Park in Pittsburgh, are parks that faced opposition and confusion as to why we were doing what we were doing. And yet, today who would think to remove those treasures from the public realm?

And the Rails-to-Trails represent the dreams of hundreds of communities across America. Cities and citizens, thousands of volunteers involved in creating their "Central Parks" and their "Chesapeake and Ohio Canals" in their communities for their children. And so I hope you keep that in mind.

Corridors, this represents—Railbanking represents a "win-win" situation for this country. It represents an opportunity to keep corridors open, that are difficult to recreate if you need to, for railroads or other uses; and at the same time, provide recreational opportunities.

Obviously, the recreational benefits are obvious. As recently as today, President Bush spoke to the need to improve the public health of America; the concern that we're getting too heavy and not having enough recreation, particularly for our children. These trails are the perfect solution to that. As recently as yesterday, I was on a trail, running, in Pittsburgh that Congressman Hart has been on. And I saw hundreds of people, many families, enjoying that trail. That is what we want to do; not take those opportunities away.

The trails provide increasingly alternative means of transportation. We now in Pittsburgh connect the two largest employment centers of Pittsburgh: Oakland, where our university and hospital research take place, and the downtown area of Pittsburgh. And we increasingly see people using trails as a means to commute to work, either by bicycle or walking, because they don't have to compete with traffic.

Green space: These trails also represent important green space corridors. We have seen an enormous amount of wildlife come to the Pittsburgh communities because of the addition of these corridors. The trails have also stimulated economic revitalization—which I would be happy to show you first-hand if you would come to Pittsburgh, how the trails have acted as a catalyst for significant amounts of development.

In addition, in Pittsburgh we have used the trails both for fiber optic corridors connecting important employment centers, as well as electric line rights-of-way; so that the rights-of-way themselves act as a multi-use vehicle. And we think it is very important.

Let me for a moment talk personally about Pittsburgh. I've been Mayor 9 years. Many people think of Pittsburgh as at one time one of the most environmentally degraded areas of the country, with the steel mills. And now it is one of the environmental success stories of the country, as we have reclaimed thousands of acres of old industrial properties.

When I was growing up in Pittsburgh as a young boy, my mother always told me two things: "Be home before the street lights come on, and never go near the rivers." I'm happy to let you know, Mr. Chairman, we're breaking both of those rules now. We are literally developing hundreds of acres of riverfront property, and at every single foot of that riverfront property is a riverfront trail that is opening up the riverfronts to the public, all on abandoned railroads. And it is exciting to see that use, that the rivers become a

place not to avoid, but a place now where people live, work, and play.

And the public parks on the old railroads along those rivers are the essential attraction to literally thousands of new houses we are building in Pittsburgh that add value to that living. Don't take that opportunity away from us, please.

So the economic development—The $4 billion of development we have had invested over the last 8 years have been intimately connected to the trail successes that we've had.

My positive experiences as Mayor of Pittsburgh have been really shared with others around the country. And I've appended to my remarks four other testimonies: One from Jan Wolcott, of Pierce County, Washington, who spoke of the 10-year-plus effort his community faced in reassembling a corridor that was not railbanked; William Newman, who provides a view of the value of railbanking from the perspective of a major rail carrier; Richard Allen, the National Security Advisor to President Reagan in 1983, when the Railbanking Law was passed by Congress and signed into law; and Janice Hodgson, Mayor of Garnett, Kansas, whose testimony demonstrates that the experience with Rails-to-Trails is very similar in smaller, rural, Midwestern towns as it is in urban, industrial cities like Pittsburgh.

With your permission, Mr. Chairman, I would like to show you just a few slides of some of the railbanking success stories around the country. [Slide.]

Mr. MURPHY. And I'd like to start with our first: Pittsburgh. Ignore the new ballpark—which, by the way, the San Francisco paper even said was the best in the country—and look at that outfield wall, and the trail along the riverfront—both public trails; the outfield wall when the teams are playing, and the riverfront trail directly, an old railroad line that ran through there. I want to commend the Congresswoman for her efforts in putting together the financing to make all that happen. [Slide.]

Mr. MURPHY. The next is in Massachusetts. It's the Minuteman Bikeway. And that is a trail that is 10 miles long. It is a railbanking trail. It's used by almost two million people annually. About one-third of those are commuters. [Slide.]

Mr. MURPHY. The Burlington Waterfront trail is, obviously, a very attractive one. You heard some of the contention about that. That is an important addition to Burlington's quality of life. [Slide.]

Mr. MURPHY. A very exciting trail is this one that will connect Pittsburgh to Washington, D.C. I had an opportunity to ride the whole thing a few years ago. Ninety percent of it is now complete. It is one of the premier trails in the country, running along the Youghiogheny River and the Potomac River on the C and O Canal. [Slide.]

Mr. MURPHY. This is a picture of the Cowboy Trail in Nebraska. It will be 248 miles when completed. It is right now 47 miles. It is, obviously, an opportunity to continue all the way across the country. [Slide.]

Mr. MURPHY. In South Dakota, this is a trail that's 114 miles long. It is used heavily by tourists and local residents. And the legislature has worked closely with the land owners on this development. [Slide.]

Mr. MURPHY. In Idaho, this trail is seven miles long, near Moscow, Idaho. And it connects two universities: the University of Idaho, and Washington State University. [Slide.]

Mr. MURPHY. This trail is in Seattle. It is 18 miles long, and it's a commuting network that runs throughout the Seattle area. [Slide.]

Mr. MURPHY. This is in Colorado, near Aspen—not far from where the forest fires are. And this trail is now seven miles, and will be extended through some spectacular country. [Slide.]

Mr. MURPHY. And this is one of the premier trails in the country. This is the Katy Trail in Missouri. It's 185 miles long. It's considered one of the crown jewels. This is a railbanking one, and it was signed into law by Governor Ashcroft at the time as one of the real national treasures that he saw for Missouri.

There is an example of some of the real success stories. And we believe it is important to continue to build those successes, and to capture these treasures when we can. These are once-in-a-lifetime opportunities. If we don't capture them when they become available, we will never have an opportunity again to get control of these rights-of-way. Thank you.

[The prepared statement of Mr. Murphy follows:]

PREPARED STATEMENT OF MAYOR TOM MURPHY

Good morning, Mr. Chairman and members of the committee. It is an honor to be here, and I thank you for the opportunity to appear before you at this oversight hearing. As the mayor of the city of Pittsburgh, Pennsylvania, I can say that we have experienced first-hand the numerous benefits of rail-trails. I trust that the other witnesses today will provide you with many of the details of the railbanking program as it relates to rail-trails and litigation. I would like to spend my brief time to ensure that we not lose sight of the forest for the trees.

In 1983, when Congress amended The National Trails System Act to create what we call "railbanking," the amendment simply provided the mechanism to accomplish what Congress had previously intended. According to the legislative history, that was to preserve railroad rights-of-way, protect transportation corridors, and encourage energy efficient transportation use. Railbanking represents a unique win-win situation, protecting the nation's historic transportation corridors, while providing the opportunity for a sensible and beneficial interim use. The result, while serving to accomplish many ends, was the formation of an effective process for creating rail-trails.

Rail-trails are of great value to our communities in a variety of ways. The first, obvious benefit is the recreational opportunity provided to individuals and families who are eager to find outlets to balance increasingly hectic lives. However, rail-trails are truly astounding in the breadth of benefits they provide.

At a time when healthy living is in our nation's consciousness, but obesity and asthma—particularly in children—are increasing problems, rail-trails promote physical activity and public health. At a time when traffic congestion hinders the economy and air pollution threatens the environment, rail-trails provide a healthy, alternative transportation option for commuting to work or running errands. At a time when preserving open, green space is a priority in many metropolitan areas, rail-trails serve to preserve precious greenways while connecting neighborhoods at the same time. And at a time when many communities, both rural and urban, are searching for tools for economic revitalization, rail-trails stimulate small business creation, provide a benefit to residential neighborhoods, and improve the overall quality of life. In addition our corridors in Pittsburgh provide both fiber optic and electrical line rights-of-way.

My personal experience supports what several studies and surveys have reported—that trails provide a wide-range of benefits to communities. When I first took office as mayor in 1994, Pittsburgh faced some serious challenges. The economy was troubled, residents were moving out of the downtown, pockets of the city were blighted including its signature riverbanks, and one magazine even listed Pittsburgh among the worst cities in the country for bike riding. I'm pleased to state that Pittsburgh is a very different city today. While there are many factors which con-

tributed to our turnaround, rail-trails have played a significant and visible role both symbolic and substantive. Trails now run through the center of our city and connect to miles of revitalized riverfront parks with a continuous path connecting hundreds of millions of dollars worth of economic development projects including new ballparks, housing and office space. We have also succeeded in connecting the two major employment centers in Pittsburgh with a bikeway. Additional segments are scheduled for completion during the next several years, and I eagerly anticipate their arrival. If, in what I hope is the very far future, a new Pittsburgh mayor and the people of my city feel that a higher and better use for our corridors is a return to rail service, I will have done my job—preserving that option by preserving the right-of-way.

My positive experience in Pittsburgh is shared by individuals around the country with many different perspectives. Since the inception of rail-trails, there have been several related hearings held by other Congressional committees, and that has provided a wealth of testimony which may be useful in providing background and context to railbanking. I have appended to my testimony the words of four other individuals who testified at previous hearings touching on the major value of rail-trails and railbanking:

- Jan Wolcott, of Pierce County, Washington, who spoke of the arduous ten-plus year effort his community faced in reassembling a corridor that had not been held intact by railbanking;
- William B. Newman, Jr., who provided a view of the value of railbanking from the perspective of a major rail carrier;
- Richard V. Allen, National Security Advisor to President Ronald Reagan in 1983 when the "Railbanking Law" was passed by Congress and signed by the president, who provided insight into the historic reasons for the program, including its role in national security—an issue which is particularly timely; and
- Janice L. Hodgson, mayor of Garnett, Kansas, whose testimony demonstrates that my experiences of rail-trails and economic revitalization in a large, urban, industrial city are echoed by the story of a small, rural, Midwestern town.

With your permission, Mr. Chairman, I would also like to show the committee a few slides as examples of railbanked rail-trails in various regions of the country. They are a national treasure and, in the few instances when it comes to that, not inappropriately financed from the national treasury.

Again, I greatly appreciate the opportunity to appear before you. As the committee looks into any concerns prompted by railbanking litigation and compensation, I urge the committee to keep in mind the tremendous value of this unique program.

ATTACHMENTS

Jan Wolcott
Director, Parks and Recreation Department, Pierce County, WA
Testimony presented to the Subcommittee on Railroads of the Committee on Transportation and Infrastructure, September 18, 1996
William B. Newman, Jr.
Vice President, Conrail
Testimony presented to the Subcommittee on National Parks, Forests and Lands of the Committee on Resources, October 30, 1997
Richard V. Allen
Chairman, Richard V. Allen Company
Testimony presented to the Subcommittee on National Parks, Forests and Lands of the Committee on Resources, October 30, 1997
Janice L. Hodgson
Mayor, City of Garnett, KS
Testimony presented to the Subcommittee on National Parks, Forests and Lands of the Committee on Resources, October 30, 1997

ATTACHMENT 1

Mr. WOLCOTT. Good afternoon, Representative Bachus and committee members.

Randy, thank you again for those generous words. I appreciate it very much.

Once again, I work for Pierce County Parks and Recreation Department. Our county has just over 600,000 people, and we boast in our county that the highest peak there is called Mt. Ranier.

Since Pierce County, as an agency, is interested in providing public park and recreation opportunities to the residents of our community, we have a vital interest to ensure that the rail banking provisions remain in effect. Rail banking is good public policy.

Pierce County is at the end of a ten-year struggle to acquire and develop an abandoned railroad corridor and convert it into a non-motorized linear park and trail. To accomplish this project, we have dealt with a wide array of complicating title problems and expensive, time-consuming judicial hearings and lawsuits.

This project is a 25-mile railroad right-of-way which was abandoned by the BN Railroad Company back in 1986. The ties and rails were pulled by a salvage company at the same time.

Immediately, 125 different adjacent property owners filed a succession of quiet title actions in an attempt to gain possession of the abandoned railroad property.

Simultaneously, Pierce County began the planning process, including the local legislative requirements to establish a public park and trail.

Many of those local adjacent property owners were excited to see our vision of a public trail and donated any interest that they might have in the railroad property to us with quick claim deeds.

Our county council passed legislation approving our project after reviewing our master planning documents and the State-required environmental impact statement. Our counsel was encouraged by a coalition of groups and organizations representing walkers, joggers, bicycle riders, equestrians, many, many senior citizens, and the disabled.

An anti-trial group challenged our project with a public referendum. They told us that we should let the voters decide.

The pro-trail coalitions in Pierce County worked tirelessly with a ''Save the Trail'' motto. The anti-trail group never mentioned the project in their campaign rhetoric. They simply misrepresented the issue by identifying the measure with a ''Stop Tax Waste'' theme.

You, as elected officials, are certainly aware how such scare tactics and misrepresentations can alter election results.

Nevertheless, our trail project prevailed and their

referendum was defeated by the voters of our county. Even though the voters had spoken, the anti-trail faction continued their assault on our project.

Despite enormous cost to our county in delays, interruptions, and court proceedings, I'm pleased to tell you that we are proceeding with our project and have begun construction and will continue that construction for the next two to three years.

I should tell you also that we are succeeding, because our trail is a classic example of how a public/private partnership can work. Our trail supporters have raised over 400,000 through fund-raisers and private grants and foundations. Their dollars have been used to match money coming from our State's Washington wildlife recreation program, our county's conservation futures program, but, most notably, ISTEA. This project, through ISTEA, has received a total of eight separate awards.

Without rail banking, we have been compelled to wade through a myriad of title problems of all kinds. For example, we have encountered the original land claims or ''donation land claims,'' as they were called, in which the underlying fee owner kept the ownership and passed it on to their heirs.

An example in our project is a family named Whitesell, who had 12 children and divided their property amongst the 12

children, none of whom are alive today. The problem is further complicated because the 12 children did not receive equal shares of property.

To reconstruct their chain of title, we researched the lineage of over 100 different people from this family alone, including birth, marriage, and death certificates.

Another problem is the case of Roeder versus Burlington Northern. In this case, when the Roeder Company sold off their business, they kept the land by accident under the railroad, similar to the DLC title problems. Once again, Pierce County is being required to reconstruct the entire chain of title before acquisition.

Connected to the northern end of our present project is 5.2 miles of BN Railroad property which they have scheduled for abandonment. The intent to abandon notices have appeared in the local newspapers on two different occasions. We have entered into negotiations with Burlington Northern to rail bank this section. They have prepared in-house appraisals to determine value, and we are preparing an offer to purchase.

The present us of the land along the railroad includes some residential, some industrial, but mostly agricultural. Also appearing along this corridor are several utility easements. Pierce County is very interested in preserving this corridor for continued public use.

The corridor is identified in our master trails system

plan.

We estimate that, without rail banking, this five-mile extension will take two years to acquire and increase the cost to the taxpayers of Pierce County by about 300 percent.

As you can tell, we think rail banking is smart and proper legislation. I cannot honestly say to this committee that our primary motivation in preserving this corridor was for future rail use, as the statute under consideration foresees. Indeed, our immediate interest is in a trail, but we are keenly aware that the highest and best use of any corridor shifts and changes over the generations.

Our children may need restored rail service. Our gift to ourselves has been to recreate this abandoned rail line as an extraordinary trail. Our responsibility to our future community has been to preserve this corridor for their needs, which may well include a return to rail service.

Those needs are not ours to determine. We have done our job in preserving the corridor so that they may have options in their time.

As my earlier testimony indicated, the burden upon us is in preserving this right-of-way, and it has been severe. Many communities faced with similar challenges are overwhelmed and do not have the resources, financial or political, to save their abandoned corridor. That is why rail banking is so desperately needed. If we are to preserve

our rail corridor infrastructure, we must preserve rail banking.

For agencies like ourselves, a great deal is at stake here, including the dismantling of historic railroad corridors, increased staff time and involvement, and unimpacted rights-of-way for public utilities, and, of course, enormous expenditures of public funds.

I urge you not to scrap the rail banking policies.

Thank you very much for this opportunity to appear before you.

Mr. BACHUS. Mr. Brown?

ATTACHMENT 2

Good morning. My name is William B. Newman, Jr. and I am Vice-President and Washington Counsel for Consolidated Rail Corporation. I appreciate the opportunity to testify today on behalf of Conrail and am here to extol the benefits of the existing Rails-to-Trails program under the National Trails System Act of 1983 (16 U.S.C. 1247(d)).

It is useful in any discussion of the Rails-to-Trails program to review some significant events relevant to the freight transportation marketplace, especially as it pertains to railroads. In the early 1970's, over 20% of our nation's Class I railroads were in bankruptcy. The passage of the Staggers Rail Act in 1980 changed economic regulation for railroads dramatically, giving the freight railroad industry the regulatory flexibility and incentive to be more effective competitors. Since the passage of the Staggers Rail Act, the railroads have significantly improved their economic performance, albeit most railroads, including Conrail, still earn a rate of return less than the cost of their capital.

Traffic trends suggest there is every reason to believe that prospects for increased rail traffic are excellent. Intermodal traffic -- the movement of trailers and containers on rail cars -- is growing 7-8% per year. The use of double-stack -- putting one trailer or container on top of another trailer or container -- thereby effectively doubling productivity, albeit with substantial capital costs, is nationwide, moving both domestic and international containers. In 1987, Conrail was the first railroad to move one million trailers and containers in one year and now moves 75% more trailers and containers ten years later. Intermodal and double-stack traffic as well as other increases in the demand for rail services, has come about because of improved rail service, better cost control, a

truck drivers, increased global trade traffic, and growing congestion problems and limited resources to build and maintain the highway network. The increased traffic has put capacity constraints on the railroads at various places, and will continue to in the face of increased freight traffic. Hence, we cannot overstate the importance of preserving future rail capacity when and where feasible.

Nevertheless, Conrail and other rail carriers, continuously seek to become more efficient, not only through improving service, but also by lowering our costs, including the shedding of unnecessary assets. The Class I rail network shrank from roughly 200,000 road miles in 1965 to slightly over half that amount, 105,000, in 1996. Prior to the Staggers Rail Act, abandonments -- the virtually irreversible dismantling of rail corridors -- were the predominant method of disposing of lines. However, in the 1980's, two alternatives to abandonment came into being, both better than abandonment in terms of preserving existing rail service, allowing potential future rail service and improving overall public policy. The first was the development of the shortline sale program wherein uneconomic lines are sold to shortline operators who generally have a lower cost structure than larger railroads, thereby preserving rail service and preserving the underlying rail corridor. There are now approximately 600 shortline railroad operators nationwide and for the over 170 connected to Conrail, they represent in the aggregate, approximately 20% of our business.

But for lines which currently, or even for the foreseeable future, do not offer the promise of viable rail service, the Rails-to-Trails program offers an alternative to abandonments, which would usually result in the dismantling of a given rail corridor to

individual landowners, thus making the corridor virtually impossible to be reconstructed for future use as a rail corridor. The Rails-to-Trails program preserves rail lines by authorizing trail use and rail-banking through agreements with interim trail users made on a voluntary basis, subject to reactivation and interim user assumption of liability in connection with trail use and payment of taxes and without burdening the abandonment process.

Since its inception with the enactment of Section 8(d) of the National Trails System Act of 1983, the nation's efforts to preserves rights-of-way has proved to be a true success story. Congress carefully struck a balance between multiple goals; preserving rail rights-of-way and the rights of railroads to dispose of their property as they see fit, inducing railroads to enter agreements by having the interim trail user assume the tax and legal liability, facilitating the marketing on entire right-of-way segments and the economic development associated with such marketing, allowing for the possible reactivation of the right-of-way by the railroad should demand arise for it, and assuring redress for the rights of adjacent landowners who have compensable property interests in the rights-of-way at issue. We believe that the courts and the Interstate Commerce Commission (predecessor to the Surface Transportation Board (STB) have preserved the balance Congress struck.

In passing the Trails Act, Congress has accommodated the needs of the public in preserving unique rights-of-way for trails purposes and permitting railroads to "bank" such rights-of-way when the rail lines within these corridors no longer made economic sense for the railroad to continue to operate. Pieced together over many years at a time

when land was plentiful and easier to acquire, these corridors would be difficult, if not impossible, to recreate in today's environment. Rather than lose them forever, Congress wisely provided a procedure for railroads wishing to abandon such rail lines to voluntarily agree with potential trail users to preserve these rights-of-way without losing them forever through reversion to a hodgepodge of adjacent owners upon the abandonment of the rail line. Congress nonetheless preserved the opportunity for such property owners to bring claims for compensation under the Tucker Act. Presault v. I.C.C., 494 U.S. 1 (1990).

To date, there have been 123 successful joint railroad-public sector projects to convert approximately 3,400 miles of these rights-of-way into trails, and to bank such corridors for potential future rail use should the need arise. (Indeed, several banked rail lines have in fact been reactivated.) Conrail has successfully completed four Rails-to-Trails transactions totaling almost 100 miles and currently is in negotiation for another 23 corridors, totaling 271 miles. Since the Trails Act unfolded, the ICC has successfully addressed many of the issues related to Rails-to-Trails transactions related to the voluntary nature of the program, deadlines, and reactivation of services so as to make the program more workable.

Conrail believes HR 2438 would eviscerate the Rails-to-Trails program for the following reasons. The repeal of the policy statement, in particular, the repeal of the policy "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors" and "interim use of any established railroad right-of-way" not being treated as an abandonment, combined with the non-

preemption of state property law in Section (5) is, pun intended, a total abandonment of the policy to preserve rail corridors for interim use with the possibility of reactivation for future rail use. Indeed, the bill is intended to give primacy to the interests of adjacent property owners, but sacrifices the policy of preserving rail rights-of-way and the possible reactivation of rail service in doing so. Since rail corridors are well-nigh impossible to assemble today, we believe it is prudent to protect and perpetuate existing rail corridors, recognizing that railroads are placed in the unenviable position of making decisions on a line's disposition, which decision may ultimately result in mixed public reaction to the disposition. Other sections of HR 2438 are intended to burden or cripple the Rails-to-Trails process by leaving it ambiguous as to who has the liability for taxes on the rights-of-way, the liability for adjacent property owners' interests, and making the Surface Transportation Board process potentially more litigious and extenuated and consequently, less predictable.

In conclusion, Conrail believes the Rails-to-Trails process works well as presently constituted and we would urge Congress not to tinker with it.

ATTACHMENT 3

Statement of

Richard V. Allen

Chairman, Richard V. Allen Company, Washington, D.C.
Distinguished Fellow and Chairman, Asian Studies Center, The Heritage Foundation
Senior Fellow, Hoover Institution on War, Revolution and Peace, Stanford University
Advisory Council of the National Republican Institute for International Affairs
National Security Advisor to President Ronald Reagan
Deputy National Security Advisor to President Richard Nixon

Presented to the
Subcommittee on National Parks, Forests and Lands
of the
Resources Committee
of the
U.S. House of Representatives

October 30, 1997

Mr. Chairman and Members of the Committee, I should like to thank you for the opportunity to appear before you today to share my views on H.R. 2438, the "Railway Abandonment Clarification Act."

My name is Richard V. Allen, and I come before you today as an individual landowner, with property in Edwards, Colorado. Edwards is a community adjacent to the son-to-be-abandoned 178-mile Southern Pacific "Tennessee Pass" rail line running from Canon City, through the cities of Salida, Leadville, Vail and Avon, to the east end of Glenwood Canyon at the Colorado River.

I have often appeared before committees of the Congress on a broad range of topics ranging from economic warfare, North Korea, nuclear weapons policy and American foreign policy, and have long been active in public affairs and public policy issues, having served in the Nixon and Reagan campaigns and administrations at senior levels. It is somewhat unusual for me to appear before this committee, focused as it is principally on domestic issues.

As a committed mainstream – and by "mainstream" I mean to say "Reagan Republican" – I'm committed to upholding the rights of individual property owners, and am sensitive to and well aware of property rights concerns associated with our nation's railbanking program. However, because others on this panel will address those issues directly, I would like to direct my remarks to four specific points.

First, because I believe in the promotion of our national interest, I suggest to you that we have a distinct national security interest in preserving our nation's built rail-corridor system.

Second, I should like to stress the importance of preserving the famous "Tennessee Pass" rail line, one of only two rail corridors crossing the great Rocky Mountains in Colorado.

Third, I would like to highlight the high level of local support which I believe now exists for preserving the Tennessee Pass by converting it to trail use until such time that it may be needed again for rail service.

Fourth, I gently remind Members of the Committee that our Nation's Railbanking statute was signed into law on March 28, 1993, by President

Ronald Reagan, one of our nation's most determined protectors of property rights.

National Security

I served two presidents and other public officials, and worked and consulted widely with the Congress on national security issues since 1968, when I was the foreign policy coordinator for the 1968 Presidential Campaign of Richard Nixon. As a long-time advocate for a strong national defense, I am very aware of national transportation policies which either advance or detract from national security interests. I should like to state emphatically that our nation's railbanking program strongly supports our national security interests. Eliminating or compromising the railbanking program would compromise our ability to defend the nation in a time of crisis, especially one of extended crisis.

Few individuals may recall that our nation's interstate highway system was first proposed by President Dwight Eisenhower as the National Defense Highway System. It was so proposed because the President and his national defense advisors recognized the strategic importance of developing a well-connected system of highways which could move freight, troops and equipment quickly from one point of the nation to another.

While our nation's rail corridor system was primarily developed by private interests, it is no less important to the strategic protection of our nation in times of war or unrest. Railbanking provides a common-sense way of insuring that the constructed rail-corridor system remains intact even though current economic conditions may make it unprofitable for private rail carriers to maintain the corridors at this time.

Like the National Defense Highway System, few individuals may know that a "National Security Railroad System" map also exists. This map identifies railroads whose preservation is considered essential for national security. The proposed legislation, H-R. 2438, would pre-empt this important strategic system by allowing states, at their own election and without regard to larger national strategic considerations, to make decisions about whether to protect portions of the security railroad system. While it may be unusual to raise national security issues before this particular Committee of the Congress, surely we can all appreciate the long-range importance of these issues. Forewarned is forearmed, and in a period of

prolonged national crisis, it may well be that we shall require railbank portions of our national rail corridor to be reinstated to service.

Tennessee Pass

With the merger of the Union Pacific Railroad and Southern Pacific Railroad, Colorado's great "Tennessee Pass" rail line is now being abandoned. As a property owner with land near this famous rail line, I appreciate the historical importance of this corridor to the development of Leadville and other mineral rich and rural communities located along its 178-mile path. We all marvel at the truly magnificent engineering accomplishments that made possible the development of this corridor. This corridor includes 119 bridges and more that 4,100 feet of tunnels through the formidable Rocky Mountains.

Under current abandonment procedures, unless the corridor is railbanked under the national railbanking statute, all 119 bridges would have to either be dismantled or would represent a perpetual liability to the Union Pacific or the State of Colorado. Similarly, each of the five tunnels would have to be blocked. Obviously, such actions would seriously damage our abilities to quickly reinstate rail-service along the Tennessee Pass line during periods of extended national emergency. Such action would also seriously damage, and most likely eliminate, any likelihood that rail service could ever be reinstated should economic conditions reverse and make passenger or freight rail service once again viable.

Problems associated with the dismantling of bridge and tunnel infrastructure are not unique to the Tennessee Pass rail corridor, but are typical of most rail corridors built through our challenging national terrain.

Local Support

The Tennessee Pass rail corridor passes through four counties and 20 towns between the cities of Canon City and Sage. Since Union Pacific announced its intentions to abandon the line, the State of Colorado has explored every possible option to preserve the corridor intact. In 1996, Colorado State Parks, in cooperation with a corridor partnership of towns and counties, state and federal agencies, and non-profit and community groups, undertook a feasibility study of turning the proposed abandonment into the "Heart of the Rockies Historic Corridor" rail-trail.

After examining several alternatives (including a no-trail alternative), the Feasibility Study Steering Committee -- comprised of local community leaders and state and federal agency staffs -- recommended that the corridor should be railbanked under the federal railbanking statute and converted to trail use.

In developing its recommendations, the committee held public open houses in each of the four corridor counties. Public support at each of these open houses was overwhelming among attendees. The attendees consistently commented it was of utmost importance to preserve the corridor, and that interim trail use was the best solution if rail service would be eliminated. Responses to a Recreation User Survey conducted along the corridor indicated that 85 percent would use the corridor, and 52 percent would use it at least once a week.

Members of seven Chambers of Commerce in the corridor responded to a survey mailed by the Committee, and 94 percent felt a trail would have positive impact on the business community in general in the region. Twenty-two percent of the businesses would also consider developing new commercial enterprises related to use of the trail and 31 percent felt that the trail would directly lead to an increase in their business.

Finally, there are 533 landowners with property adjacent to corridor, and 182 responded to a survey of their interests. While 53 percent registered concerns about privacy, 49 percent nonetheless supported the trail and just 11 percent were unsure. There responses are typical of surveys along proposed rail-trails nationwide, and experience has proven that adjacent property owners generally find that once a trail is in place, these concerns diminish.

On a more personal note, I had the opportunity of discussing the Tennessee Pass rail-corridor the other night meeting with the Mayor of Avon, Colorado -- one of the key communities though which the rail-trail would directly pass. The Mayor of Avon informed me, informally, that among his town council, there is no voice of opposition to the proposed rail-trail or the railbanking of the Tennessee Pass.

President Reagan

Finally, I would suggest to Members of this Committee and the House of Representatives that the railbanking statute was signed into law by

President Reagan during his first term of office. During that period, I am personally aware of the review which every bill forwarded by Congress received prior to its consideration by the President. The Office of Management and Budget routinely reviewed all proposed legislation before forwarding its recommendation to the President to either sign or veto a bill under question. Following OMB's review, President Reagan signed the railbanking statute on March 28, 1983.

I suggest that this committee follow President Reagan's leadership and refrain from weakening or dismantling this important legislation which helps to implement our national policy of preserving our built rail-corridor infrastructure.

Thank you. I would be happy to answer any questions the Members of this Committee might have.

ATTACHMENT 4

Testimony of

JANICE L. HODGSON

MAYOR OF THE CITY OF GARNETT

presented to the
Subcommittee on National Parks, Forest and Lands
of the
Resources Committee
of the
U.S. House of Representatives

October 30, 1997

131 West 5th P.O. Box H, Garnett, KS 66032
(913) 448-5406 Fax: (913) 448-5585

City of Garnett

October 27, 1997

Good morning, Mr. Chairman and Members of the Committee. My name is Janice L. Hodgson.

I am the Mayor of a community in Kansas which has a railbanked corridor which runs directly through our town. We currently receive a quality of life benefit from the National Trail System Act because we have a wonderful linear park which connects both of our city parks and reservoirs with the town square.

The Prairie Spirit Rail Trail between Richmond and Welda, Kansas, with Garnett as the central point, is now completed and is providing tremendous economic development and tourism results for the City of Garnett. Users are experiencing a healthy, safe place to walk, ride and bike as they enjoy all that nature has to offer. Ground breaking ceremonies for Phase II from Richmond to Ottawa occurred on Friday, October 24, 1997.

This is the first major tourism project for this area and the first rail trail in the State of Kansas. The 1.3 million dollar project was started by the Kansas Department of Wildlife and Parks and the Kansas Department of Transportation. This project was funded by ISTEA funds and we wish to thank the United States Congress for authorizing the highway transportation monies for this use. We were required to provide twenty percent (20%) of the funds to complete this project and these funds were provided by state and local government and private contributors.

The City of Garnett, through its economic development office, is keeping a close eye on the use of the trail as well as the impact that it has on our local economy. I promise that we will do everything possible to insure its continued success. We are committed to maintain three (3) miles of the trail that runs through our corporate limits.

Garnett is a rural community of 3,200 people. We are a community of volunteers and hard working people who understand what an enormous project the trail is. But we are willing to work hard to provide a quality of life environment not only for our citizens but for the many visitors that we are attracting to this area.

131 West 5th P.O. Box H. Garnett, KS 66032
(913) 448-5496 Fax: (913) 448-5555

Sales tax collections reflect a 7% increase from 1995 to 1996. We project that sales tax revenues from 1996 to 1997 will increase by 15% which we feel can be attributed somewhat to trail users that are coming to our city.

The proposed Amendments to the National Trails Act would remove the federal laws ability to override state law. Supporters of these amendments want the states to be able to decide how these corridors should be preserved, yet by the current statutes in Kansas, these right-of-ways would be disposed of as soon as they are abandoned by dividing the right-of-way among the current owners of the adjacent property. There is no mechanism in the State of Kansas to preserve rail corridors. The Kansas statutes divides all property, regardless if the land was from a direct grant from the U.S. Government to the railroad or obtained through an easement.

The railbank corridor, which travels through our community, was established in the 1860's and 40% of the rail right-of-way was from a direct grant from the U.S. Government. Other parcels were obtained through donation and the purchase of easements. Without railbanking all this would be divided among the adjacent landowners under current Kansas statute.

The corridor could be lost and with it any hope of future reactivation either for freight or for a possible light rail connection to Kansas City. In the meantime, our town would be deprived of a major resource for economic development.

In 1996, Governor Bill Graves issued a one (1) year moratorium on the construction of the second 15 mile section of the Prairie Spirit Trail. This would allow the county commission for the county through which that section passed to have the right to stop construction by simply voting not to allow the trail to pass through their county. The moratorium was for one year. In that time the County Commission never called a vote on the trail. After the year was over the moratorium was lifted and plans for construction began.

For these reasons, I am here to discourage any amendment to the National Trail System Act which would place the Act in danger and fail to provide a nationwide plan for the conservation of rail corridors.

I appreciate the time you have given me to express our opinions. Please visit our area and enjoy Kansas' first rail trail.

Mr. BARR. Thank you very much, Mayor Murphy.

It's my understanding, Mr. Sansonetti, that you do have to leave shortly for another engagement. With the concurrence of the rest of the panelists, and without objection from Members of the Subcommittee, what we'll do is any Members of the Subcommittee that have questions for you, Mr. Sansonetti, if we could ask those first, so you can leave for your next appointment. And then we'll direct questions to other witnesses. Without objection, we'll proceed.

[No response.]

Mr. BARR. Mr. Sansonetti, what is the status of the Department's decision to appeal the Preseault case? The timing, and the status of that decision-making, please.

Mr. SANSONETTI. Okay. Let's see, the situation right now is that the parties were unable to reach agreement as to the amount of attorneys' fees that will be awarded in that particular case. As Mr. Ackerson had originally said, the court had awarded just compensation of $234,000, plus interest. The situation with the attorneys' fees was at 894,000, or 61 percent of the requested amount.

So that's where we are. And I believe that we've got a period of time yet to decide whether or not to appeal. The way things work within the division, the attorneys assigned to all of these cases are part of our environmental defense section. They work with our appellate section. They end up preparing an initial recommendation. It comes to me, but because we're at an appellate level, the Solicitor General makes the final decision.

So I will be getting a recommendation from my section chiefs. I then sign that recommendation; change it; whatever. But then I sign that recommendation; send it to Ted Olson, the Solicitor General. He makes the final decision. So it sounds like that decision will have to be made by the end of the summer.

Mr. BARR. Will that be consistent with the deadlines that the court has imposed?

Mr. SANSONETTI. Right. Yes, sir.

Mr. BARR. Okay. I would appreciate it if you would notify us as soon as that decision has been made.

Mr. SANSONETTI. Gladly, sir.

Mr. BARR. We certainly don't want to interfere in the internal proceedings right now, but we certainly have an interest in trying to see that kind of case resolved.

With regard to—And I'd like to direct this both to you, Mr. Sansonetti, and then Mr. Flake might have some questions also for Mr. Sansonetti. But I'd also like you to address it, Mr. Ackerson, since you have extensive experience in litigation here; and Ms. Ferster also.

Mr. Sansonetti, what specific steps—and I realize that you've only been at the Department in this capacity a number of months. And this case, sort of like *"Jarndyce* v. *Jarndyce"* [ph], has been dragging on for year after year after year. Does that concern the Department, the effect of protracted litigation, both on expenses to the taxpayers, taking resources away that could be used on other perhaps more pressing cases of public note; as well as the cost to the individual parties themselves? Is that a concern to the Department? And is the Department looking at ways that this process can be streamlined and considerably shortened?

Mr. SANSONETTI. The answer is, definitively, yes. I've only got 410 lawyers in my entire division. And we end up having to take care of everything from the litigation work for the Environmental Protection Agency; the Department of Interior; all the Forest Service at Ag. Fifteen percent of our cases are for the Pentagon—going up after September 11th. The Department of Commerce; and NOAA; Department of Energy, everything from Yucca Mountain to moving plutonium from Rocky Flats to South Carolina.

We have got more than the number of cases to handle; over 11,485 cases. Now, 410 lawyers: I've got eight of them right now, pinned down, working on these cases. And to me—And maybe some people will say, "Well, eight lawyers doesn't sound like much." It can be. So, am I concerned about the taxing of my resources in handling these cases? You bet.

What can we do about it? And what about the Preseault case? Frankly, the Preseault case is the ice-breaker. As you've heard through all the initial comments here, when that case came out in 1990 and the ruling was made that there was going to be a determination of just compensation, this is the very first case that's moved all the way through the court system, where we've had to basically deal with the problems of ownership issues, the liability determination.

After that, your appraisal process: What is the just compensation? Attorneys' fees, should they be awarded? If so, how much? Should there be interest on that amount? If so, what interest? There's nothing in the statute that says it's 3 percent, 5 percent, 10 percent.

So it is one of the cases that has been very litigious on each of these points. But it's also going to provide, hopefully, some guidelines for the future that'll be—Some of the benchmarks are actually being set in this case.

You asked about: Is it in our best interest to also try and streamline the procedures? Definitely. And as I mentioned in my oral statement, some of the things we're trying to do is to work with the courts where we have the majority of our cases—the Court of Federal Claims—to get their rules lined out for these kinds of cases, so we can move more quickly through the determination stage of who actually owns the reversionary interest. That's the first thing.

And making sure that, right from the get-go, the discovery process is shortened, by making sure that the plaintiff already brings to the table, right at the start, whatever deeds they're relying on, conveyances, old easements, rights-of-way, right from the get-go. And a lot of these are, you know, nineteenth century—you know, 1904, 1910 documents. So those are the kinds of things we're trying to do.

We're exploring, as I said, the use of ADR. It doesn't always work, but at least we're trying to do it. And also, the example of using representative parcels down an entire stretch of mileage, that we can take as examples, find out what the compensation should be.

Mr. BARR. Is the Department looking at possible legislative remedies to help streamline the process and establish a better proceeding, perhaps at the beginning of a dispute involving Rails-to-

Trails, so that a look at compensation and some of these issues could be addressed right off the bat, before litigation?

Mr. SANSONETTI. I'm too new to know whether or not the legislative shop has looked into that, or not. But I think that with, again, the Preseault case being the ice-breaker out front here, I think once it is finally concluded, that will provide a very good backdrop by which the Administration can come through with some suggestions.

Mr. BARR. Of course, if it's appealed, that could go on for several more years. I would encourage the Department not necessarily to wait until that case is finally and absolutely resolved before looking to see if there are some legislative steps that you all could recommend to us. Because I think you'd find a receptive group of folks, certainly, here.

Mr. SANSONETTI. I'd be glad to do that.

Mr. BARR. Thank you.

The gentleman from Arizona, the distinguished Vice Chairman, do you have any questions for Mr. Sansonetti?

Mr. FLAKE. Yes. I thank the Chairman. And I thank Mr. Sansonetti and the others for their testimony. Just briefly, to follow up on this, the Preseault case, you see it as an ice-breaker. Is this good precedent, do you think, being set? If you look at the disparate amounts for attorneys' fees, versus actual compensation, does that not cry out for some kind of legislative remedy moving forward? Or should we say, "Oh, goodie, we have precedent now. Let's move forward on this basis"?

It would seem to me that, you know, the average person looking at this would think, "If this is precedent, perhaps we need some remedy." What's your feeling?

Mr. SANSONETTI. I do agree that, when you've got amounts actually granted to the land owners in an amount that are much smaller than what ends up being the total amount that ends up being rewarded on attorneys' fees, that you've got yourself a pretty strange anomaly.

But you also have to look at the role of the Department of Justice. We didn't write the law. We're trying to follow it. That's our job. And frankly, I've got to end up striking a balance between making sure that just compensation is indeed paid, you know, when it's indeed owed, to a deserving land owner; but I've also got to make sure that there is a protection of the Federal fisc.

So the rule that is in place right now in litigation—because, obviously, I'm in the Executive Branch, but I'm dealing in the Judicial Branch—is to make sure that the correct person gets paid, and that the amounts that are awarded are proper.

Now, if the Legislative Branch wants to come back into the arena in looking and seeing what's happened in this first 10 years, 12 years, of litigation, and needs to amend the legislation, then obviously that's your bailiwick.

Mr. FLAKE. Thank the Chairman.

Mr. BARR. Does the gentleman from the Commonwealth of Pennsylvania have any questions for Mr. Sansonetti?

Mr. GEKAS. Just one question. He seemed to imply that—You seem to have implied that in ADR, the use of ADR, you said it doesn't always work. Does that mean that it has worked?

Mr. SANSONETTI. Yes. It has worked in a couple of instances. I mentioned the Moore case and the Illig case, where it has been helpful. But then there are other cases where the other side has said, "No," or you just can't reach an agreement.

We tried ADR, if I'm not mistaken, in the Preseault case, as it dealt with attorneys' fees. And if I can look at my notes here—Yes, we had requested jointly the assignment of an ADR judge to that, and memoranda were assigned to that judge. Several formal sessions were held. In the end, the parties weren't able to reach an agreement. And that's where I noted in the end the court ended up having to make a decision, and it was 61 percent of the requested amount. So sometimes it works, but sometimes it does not.

Mr. GEKAS. So that the final figures that Mr. Ackerson and Ms. Ferster referred to on the Preseault case were as a result of court decision, and not ADR?

Mr. SANSONETTI. That's correct, sir.

Mr. GEKAS. I have no further questions of our first witness.

Mr. BARR. I thank the gentleman from Pennsylvania.

Mr. Sansonetti, we appreciate very much your being here today. I understand that you do have another engagement you have to leave for, so feel free to leave when you have to. You're certainly welcome to stay and listen to the rest of the panel Q-and-A, certainly, though.

Mr. SANSONETTI. Thank you, sir. Actually, my event is just in about 30 minutes.

Mr. BARR. Okay.

Mr. SANSONETTI. So I'm going to have to hustle there now.

Mr. BARR. Well, we appreciate your being here. We will be submitting some additional questions to you, and certainly would invite your additional comments or background, as you deem appropriate, just to provide as full a record and understanding of these issues for the Subcommittee as possible.

Mr. SANSONETTI. I'll be delighted to do so. And as I get more into it myself, I'd love to come up and visit with you Members of the Committee and your staff. We'll work through this problem.

Mr. BARR. Look forward to it. Thank you, sir.

Mr. SANSONETTI. Thank you.

Mr. BARR. We'll now turn to questions for the other panelists. And in so far as I think I've pretty well exhausted my initial 5 minutes with Mr. Sansonetti, I'd turn to the gentleman from Arizona for 5 minutes.

Mr. FLAKE. Mr. Ackerson, how out of line is the disparate amount we're seeing here, given the other cases you've been involved with, between attorneys' fees and actual compensation?

Mr. ACKERSON. I hope it's far out of line, but I fear that it will not be. And the reason I say that is because the Preseault litigation now has gone on for many, many years, before even the taking was acknowledged by the Court of Appeals for the Federal Circuit. But the amount that was recovered, the amount that could be sought by Mr. Preseault, was limited to the proceedings before the Court of Federal Claims and the Court of Appeals.

Now, that did go on for a number of years. The other cases I certainly hope will not go on that long. But our experiences in the other cases are that the litigation issues are taking a huge amount

of time. Mr. Sansonetti is correct that there are new issues of law that are being asserted. But if Mr. Walk were here, I'd want to take issue as to who's being frivolous. Because I think there can be frivolous defenses, as well as frivolous lawsuits.

Now, in fairness to the Justice Department, it doesn't have very many guidelines to follow here. And so it does feel that it has an obligation to protect the taxpayers' money from acknowledging a title issue, perhaps, that it thinks it can dispute.

We're finding, however, that even if the claims are very small, for a small portion of land, that the amount of attorney time that may be involved, both by the Government and by the land owner, can be very substantial. I would be surprised in the long run, under the current system, if the attorneys' fees are not continuously substantially greater than the amount of recovery to the land owners.

Mr. FLAKE. Ms. Ferster, you mentioned that the Preseault case was anomalous, unique. We also hear that it's the ice-breaker, it's the first one to go through. How do we know that it's unique, or that there are anomalies about it?

Ms. FERSTER. Well, I think all of the witnesses have referred to the Preseault case as being anomalous. And it is anomalous for several reasons. One reason that we think it's anomalous, in terms of the result that was reached by the Federal Circuit, is that it is a unique fact pattern, in that the rail-trail was created on that corridor in the '70's, actually, before the Railbanking Law was ever even passed. And so this is a situation where you have, if you will, a retroactive railbanking. And we think that that affected the outcome of the Federal Circuit's decision, in terms of the result reached.

You will not have that fact pattern any more, because all of the current compensation claims relate to corridors where the trail use followed the railbanking order, and didn't precede it. So that's certainly one anomaly.

In terms of the disproportionate costs surrounding the Preseault case, I think everybody has referred to the Preseault case as the ice-breaker case. And that is true. Mr. and Mrs. Preseault have been in the somewhat unfortunate position as having their case be the vehicle for resolving some of the jurisprudential issues that are fairly complicated, as well as the procedural issues surrounding how these takings cases are going to be litigated. And that, unfortunately, has resulted in costs associated with the Preseault case, both in terms of internal attorney time, as well as court-awarded costs, that we do not believe are likely to be replicated in other cases.

Instead, we feel that the new model for the compensation cases might be the Marriott case that the Assistant Attorney General referred to in his testimony, which was an individual claim that was settled very, very efficiently, both on the compensation side as well as on the attorneys' fees side.

So it's our expectation that the Preseault case is the anomaly because it's the ice-breaker case, as well as having anomalous facts; and that other claims, at least at the trial court level, will certainly proceed much more efficiently.

And of course, as I said in my initial testimony, we hope that when these cases reach the stage where appellate review is appropriate, that the appellate courts will revisit the ultimate finding in the Preseault case that there was taking, that a taking occurred in these cases; and that in other cases where they don't involve such anomalous facts as in the Preseault case, that in fact the courts will ultimately determine that in fact the railbanking program does not affect the taking of property interests.

Mr. FLAKE. I thank the Chairman, and yield back.

Mr. BARR. Thank you. The Chair recognizes the distinguished gentleman from the Commonwealth, Mr. Gekas.

Mr. GEKAS. Thank you, Mr. Chairman.

Mayor, in the presentations that you gave here—all of which were beautifully outlined for everyone to see—I take it that claims and suits and disputes did not hamper the completion of those projects that you showed us. Is that correct?

Mr. MURPHY. I've got to say, in Pittsburgh the trails that we've done, we have had no litigation involved in any of them. We've been able to settle those.

In some of the cases you saw nationally—In the Katy Trail, there is active litigation going on now. So there are some—The trails were created under the Railbanking Law. They were built, and probably because of cases in other areas of the country, those land owners later went back in and filed claims to some of the properties. So some of those trails that you saw there have active litigation on them.

Mr. GEKAS. Pending at the moment?

Mr. MURPHY. Pending litigation, right.

Mr. GEKAS. On the Preseault case—back to that—with Mr. Ackerson and Ms. Ferster, both of you seem to agree that it should not be conclusive, or it should not be considered as the final word. Is that correct?

Mr. ACKERSON. Well, it is the final word on some things, I believe. I believe it's the final word on the fact that a taking has occurred; that when the Government determines that a railroad line that otherwise would revert and belong to the adjacent owners is converted to a trail use, that amounts to a physical taking of that property; and therefore, under the Fifth Amendment, the land owners have to be paid. I think that has been clearly established.

Mr. GEKAS. Well, then, the one case that's cited by one of you, where the reverse decision came, it was denied on not a companion case, but a similar case; that the result was just the opposite. Chevy Chase Land Company versus U.S. Somebody stated it. Let's see——

Mr. ACKERSON. Yes, that is correct.

Mr. GEKAS. Yes.

Mr. ACKERSON. And I am familiar with that case. And the issue there is really one that Mr. Sansonetti was leading to in some of his testimony and in answer to a question.

When railroads acquired land, most of it in the 1800's, they acquired it in many different ways. And they acquired it, often, by having a land man go down the line where the railroad was to be built, and try to acquire the property from the people who owned it. Sometimes they would acquire an easement for railroad pur-

poses. Sometimes they would actually buy the fee-simple interest in the land. Sometimes they would condemn it. And sometimes—the origin of the word "railroading," I understand—they simply went through. So in some places, you see no documentation at all. In other places, it's clear that the land owners still own the land, because the railroad only owned a right-of-way for railroad purposes.

In our experience across the United States, the large majority of the cases to date have found that the railroad did not own a right after it abandoned railroad use. There have been decisions by a large number of State supreme and appellate courts in various States that have concluded that that is the law. And a vast majority of—Well, I guess all of the courts in all of the States have held that if a railroad only gets a right-of-way for railroad purposes, it does not own the fee-simple.

So in the case of the Chevy Chase case, it was determined that the land owners did not own that; that the railroad did in fact acquire a right under Maryland law to have a trail to succeed after the railroad had been there. That is an unusual case, but there are at least two other cases in the country where a similar result has been reached.

Mr. GEKAS. Well, then you do not consider it as muddying the waters, as to the Preseault decision?

Mr. ACKERSON. No, I do not.

Mr. GEKAS. Is that the same with you, Ms. Ferster? The way it's cited here in your testimony, it seemed to imply to me that the fact that it was denied in another case means that it's still unsettled.

Ms. FERSTER. The way I would have to respond to that question is to say that there are a number of predicate questions that a court addresses in resolving a takings challenge arising out of a railbanking order. And of course, most of the compensation cases focus on the threshold issue of whether the plaintiffs even have an ownership interest at all in the railroad corridor. It's more even a standing question, if you could characterize it as such. Do they have even a claim to ownership in the corridor?

If they do, if they can demonstrate that they have an ownership interest in the corridor—as in the railroad owns only easement—the courts next address a second question about whether the easement is nonetheless continued for the duration of the trail use, or whether it—and the scope of the easement includes the trail use.

And then, if the answer—And then the third question, and that's the constitutional question that's addressed in the Preseault case, is if in fact it's shown that the railroad acquired only an easement and the easement is extinguished because the trail use is not within the scope of the easement—which is a State law issue—then the Federal constitutional question is whether a taking has occurred by operation of the Federal Railbanking Law.

And the Preseault case is the only case that has focused on the constitutional question. And we do regard the Preseault case as unique and anomalous, as I said, because it involves a factual situation where, you know, you had a trail use that preceded the railbanking order. And I think the Federal Circuit's decision focused on that, to a certain extent, and expressly disclaimed ad-

dressing the larger question that would be presented in other, perhaps more appropriate, cases.

In the Chevy Chase Land Company case, they never got beyond that threshold standing issue, the State law issue. They said, "We don't need to—" you know, there was no need to reach the question again of whether or not there was a taking under Federal constitutional law, because under State law the claimants had no ownership interest in the corridor.

We don't think that the Chevy Chase Land Company case is an anomaly. We think that that's likely to be the threshold result in many of these takings claims as they are adjudicated; that in fact many of the claimants will not be found to have possessed an ownership interest at all in any railbank corridors and they cannot pursue that claim any further.

But we also strongly disagree with the constitutional question that, if there are those few claimants that can demonstrate under State law that they had an ownership interest in the corridor, and that the railbanking statute interfered with that or thwarted it, that that represents a taking. And we would disagree with that conclusion.

Mr. GEKAS. I ask unanimous consent that I be granted an additional 30 seconds, just to wind up my questioning.

Mr. BARR. The gentleman is recognized for an additional 1 minute.

Mr. GEKAS. Do I take it from there that the claimants who are now in court or in litigation in any sense, or even in alternative dispute resolution, are they citing Preseault as their authority for bolstering their claims?

Mr. ACKERSON. Yes.

Ms. FERSTER. My understanding is that the claims that are being asserted at this point are really focusing on the ownership issue; and that the briefing that the courts are addressing at this point really is focused very closely on whether or not the claimants have an ownership interest in the corridor.

Mr. GEKAS. I understand.

Ms. FERSTER. And that's what all the alternative dispute resolution mechanisms that have been brought to bear in the class action cases have also really focused on, is that threshold question. And I believe that is correct, that at the trial level the assumption at this point, going in, is that they're going to focus solely on the ownership issue.

Mr. GEKAS. I thank the Chair.

Mr. BARR. Thank you. The Chair notes with pleasure the arrival of the distinguished Chairman of the Constitution Subcommittee, Mr. Chabot from Ohio. Welcome, Mr. Chabot, a member of this panel, as well. It's my understanding, Mr. Chabot, that you don't have any questions to pose to the panel?

Mr. CHABOT. That's correct, Mr. Chairman. I do appreciate your holding this hearing, and I will review the testimony, the written testimony of the witnesses. I apologize. We've got several committee meetings going on at the same time. But thank you very much.

Mr. BARR. Thank you, sir.

In an effort to promote greater efficiency, in 1986 the Court of Federal Claims adopted rule 13, which promotes the use of mini-trials and settlement judges in order to expedite cases. Mr. Ackerson, beginning with you, what might be the feasibility, in your opinion, of using rule 13 to more quickly resolve these cases?

Mr. ACKERSON. Mini-trials might be helpful. The ADR process in the Preseault case was not helpful. The way in which it was approached was: the presentation, as if it were a separate trial; submitting to the judge a number of motions, briefed for his determination, which might aid in the settlement process. It turned out that the amount that the Government was willing to offer through that process was substantially less than ultimately was received, and there was a very wide margin. And it took approximately 6 months of time and a great deal of lawyer effort to go through that process.

I agree with what Mr. Sansonetti said a little while ago, that in order for an ADR process or a mini-trial process to work, to confine the issues, there must be an effort on both sides to try to expedite the process. If not, then an ADR process simply delays and compounds the problem, and adds another layer of attorneys' fees and time and cost.

Mr. BARR. Is there a role for litigation in addressing that? Are there some specific things that Congress could do?

Mr. ACKERSON. I think there are roles both that Congress can do, and I think there is a role that the Justice Department can and should do. And that is, I think that the Justice Department should not be seeking to address all of the complicated issues first; but should reach a conclusion based on precedents that, once a competent court has reached a decision, such as on the takings issue—was the Fifth Amendment violated, and is just compensation due?—I don't want to see that issue litigated again, court by court, in different districts around the country. Because we've done that.

So I think the Justice Department can establish precedents that say, "When we acknowledge that the land has been taken, a trail is there, there is no dispute about that, a class action can be an efficient way of addressing the rights of all the people along a certain trail or in a certain State." If they can accept that, rather than contesting it, that would take out a huge body of the lawyering time. So, yes, I think the Justice Department could do that.

Now, one of the other things that the Justice Department can do is it can help to determine the ownership issues in the process. Let me, if I may, put that in context. I'm sorry for a long answer, but I need to put this in a little context, if I may.

When the railroads purchased the land, they acquired documents that show what they own. Under the Rails-to-Trails Act, under the railbanking procedures, the railroad is paid by someone—the trail operator, the city, the non-profit, whoever it may be—for the rights the railroad has. The railroad may have no rights whatsoever; but the railroad gets paid for whatever rights it has. And the railroad has the title documents that show what rights it has. Some of those may be recorded; some of them may not.

When we're talking about—and when Mr. Sansonetti was talking about, and when Ms. Ferster is talking about—the land owners proving their title, the land owners easily can prove their title to

the adjoining land. What is being asked of them is to go to the railroad, find out what the railroad owned back in the 1800's, and put that forward and say, "Well, the railroad doesn't own the land." So they're being asked not just to prove what they owned, but what the railroad did not own, and therefore what the trails group does not have.

That's a process that is unnecessarily cumbersome. Persons who have good lawyers can accomplish that. One way we can accomplish that—and we do it every week—is we send a paralegal out to the National Archives in Beltsville, to look at the records that were made between 1913 and 1920 by every one of the railroads, acknowledging what land they owned and how they got it.

Now, we have to go through that process. It would be so much easier if the railroads simply were required to turn that process over at the beginning, to acknowledge what they owned when they're creating the railbanking process.

Mr. BARR. Could that be done legislatively?

Mr. ACKERSON. That would have to be required legislatively. The railroads cannot be compelled to do that under the present process.

Now, the Justice Department certainly could cooperate with the land owners in trying to seek that information voluntarily, rather than prolonging the process and making it more expensive. But much of what the Justice Department can do, it would have to be urged to do that, simply because it will expedite the process and will result in faster and cheaper justice—not that the right people will not be paid, or the wrong people will be paid; but it will be faster and more efficient.

Mr. BARR. Ms. Ferster, what would be your reaction to that? We're really not—Nobody is really in this hearing arguing against the Rails-to-Trails program. We're just trying to look at some of the problems that have developed as a result of it. And would not such things as Mr. Ackerson is talking about here be appropriate to try and move the litigation and minimize the expense to the taxpayers ultimately?

Ms. FERSTER. Well, I mean, to start with your initial question about the claims court and whether or not it has the mechanisms that can assist in the resolution of this litigation, I think the answer is, yes, the claims court has been a pioneer in the resolution of complex litigation involving claims against the Government. Witness the swine flu litigation and the resolution of that by the claims court.

They have the tools to do it. And I think they are the appropriate body. I think what has complicated the litigation to a certain extent has been the insistence by plaintiffs' counsel on using class actions as the mechanism for resolving these claims.

And as Mr. Sansonetti's written testimony makes clear, class actions are virtually unheard of as mechanisms to resolve takings claims, because the Supreme Court has very clearly stated that these are ad hoc, factual questions that need to be resolved on a case-by-case base. So once you superimpose the class action mechanism on top of these, what are essentially, and must be, individualized claims, you do get an added complexity that complicates the litigation.

The other complexity, of course, is that the class actions are being brought outside of the Federal claims court, in the district courts. And again, the Federal claims court does have the rule and the expertise for these complex class actions. The Federal district courts often do not have that facility.

Nonetheless, we do think that the cases will proceed much more expeditiously, again because so many of the issues have been resolved through litigation that's occurred to date. As to Mr. ackerson's point——

Mr. BARR. Excuse me. Before you leave that point, then looking at the Court of Claims rule 13, do you think that is an appropriate mechanism to address these cases and should be used more?

Ms. FERSTER. Well, my understanding is that rule 13 does have provisions for mini-trials. It does have provisions for, for example, Federal Claims Court judges to ride the circuits, if you will, to go out to the areas where the claims are being brought, and to hold mini-trials there; as well as alternative dispute resolution mechanisms. And I think they have quite a substantial bundle of tools that they can use to resolve these claims very efficiently.

So our view is that that is the most appropriate place for these claims to be adjudicated; and that that's where they should be; and that that would be more efficient, to keep them in the claims court, as opposed to out in the district courts. Where, of course, Washington counsel, such as Mr. Ackerson, needs to travel out there anyway. So it doesn't necessarily help the local folks avoid the cost of Washington counsel, since Washington counsel seems to be handling all those cases anyway. May save in the cost of local counsel, however.

Mr. BARR. Excuse me. And I'll come back to you in just a moment. But just to sort of finish up this discussion, specifically with regard to rule 13, Mr. Ackerson, is this a mechanism that in your view also should be used more to resolve these types of issues?

Mr. ACKERSON. I think rule 13 definitely could be, and should be, used more, with the cooperation of the parties. The problem that I mentioned before is that if either one of the parties chooses to litigate heavily and to contest many issues, then rule 13 cannot do much to speed things up. Neither can any other ADR process.

It's my judgment, after having gone through this, both ADR and non-ADR, that if for example the Justice Department wants to test a number of legal theories, then ADR is not going to be productive. We may as well go straight to trial as quickly as we can get there.

If the Justice Department is eager in establishing some standards by which it will accept certain precedents and go forward, then I think that the rule 13 process could be very helpful on those remaining issues, yes.

Mr. BARR. Thank you. Ms. Ferster, if you would, I think you were going to readdress some of the other questions that have been posed. I'd like to give you a little bit of time to do that, if you have anything to add.

Ms. FERSTER. I'm sorry, did you have a specific question you would like me to——

Mr. BARR. No, I was just, I think, perhaps, just getting some thoughts on how best the whole process here might be streamlined,

if there's anything additionally you wanted to add to, you know, the discussion of some of these different aspects.

Ms. FERSTER. I don't think we do. I think we think that the Justice Department and parties are doing a good job. They've gone through some hard procedural issues. So far, they've resolved a lot of them. I think the cases are going to proceed more efficiently and more expeditiously from this time forward. And I don't think that there really is any need to create any new remedies or tools for the courts. They have the tools. They already have ample tools to address these cases.

Mr. BARR. Thank you.

Does the gentleman from Arizona have any additional questions for the panel? Mr. Flake?

Mr. FLAKE. No further questions.

Mr. BARR. Thank you.

Mr. Murphy, we appreciate your being here. And I know that you alerted us with some degree of pride at the beginning that you were not a lawyer. We've sort of gone off on a number of very legalistic aspects here, all designed to try and streamline the process a little bit so that the program for which you very eloquently and graphically have shown us the benefit can move forward better, with the interests of all parties in mind.

I'd like to give you the last word, since we've then sort of gotten off on some of these legal issues, if there's anything you'd like to add.

Mr. MURPHY. Only in the efforts to streamline the process, that we not lose the opportunity. The fear is that if railbanking goes away, that there will be—Communities, often driven by volunteer efforts, face an impossibility in trying to recreate these corridors.

So I recognize the need to streamline the process for the purposes of the Justice Department. But at the same time, I would hope that Congress would keep in mind the overall goal of this, which is to provide both long-term potentially rail lines once again, where they might be needed; but for the time being at least, provide remarkably important recreational opportunities for our communities. Thank you.

Mr. BARR. Thank you, Mr. Mayor.

The gentleman from Arizona.

Mr. FLAKE. If I might just make a comment, I thank the Chairman for holding the hearing. And to the extent that the Preseault case does establish precedent, I think that the Chairman is wise to call the hearing to figure out what we need to do going forward. Because that's a troubling precedent, if that is the case; particularly the disparate amounts going to lawyers, as opposed to actual land owners.

And this may be an anomalous case, but there are issues, given ownership rights-of-way and what-not, that are going to make every case—Every case every lawyer has ever been involved with has always been described as unique. And I can just imagine the unique and anomalous cases that we're going to run into. And so I think we need some broader guidance, as has been suggested in the testimony so far. I thank the Chairman again.

Mr. BARR. I thank the gentleman. There have been a number of statements submitted to us for the record. And without objection, those will be admitted to the record.

Mr. BARR. Again, for the witnesses—and we'll be in contact also with Mr. Sansonetti—any additional materials that any of you would like to present to the Subcommittee within the next 7 days will be included as part of the official record.

In addition, we will have some additional questions for the witnesses, and we would appreciate very much your expeditious review of those and getting the additional information back to us, so we have as comprehensive a record as possible to pass on to the full Committee when it considers these matters.

I'd like to again thank the witnesses with us today. It's been very, very enlightening, a very enjoyable hearing. We appreciate your time and expertise coming to bear here today. And at this time, we declare this hearing of this Subcommittee closed.

[Whereupon, at 11:56 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF LINDA J. MORGAN

INTRODUCTION

I am Linda J. Morgan, Chairman of the Surface Transportation Board (Board). At the request of the Subcommittee, I am providing this written statement for the record on behalf of the Board, to discuss the role of the Board in the rail banking process through the National Trails System Act (Trails Act), which allows rail lines that otherwise would be abandoned to be preserved for future reactivation.

THE EXISTING RAIL BANKING/TRAILS ACT PROCESS

Rail banking is a way to preserve railroad rights-of-way for future use, and it is achieved through the implementation of the Trails Act. The Trails Act gives interested parties the opportunity to negotiate voluntary agreements to use, for recreational trails, railroad rights-of-way that otherwise would be abandoned. The Act also is intended to preserve railroad rights-of-way for future use, which is called rail banking.

Many railroads do not own the land on which their track lies. Rather, they have easements over the land of adjoining property owners. Unless those easements are rail banked by converting them to a trail, they are extinguished, and the land reverts to the adjoining property owners when the Board authorizes the abandonment of the line and the abandonment authority is exercised. Some rights-of-way that were made into trails have been reactivated as active rail lines.

The Board has adopted specific procedures that are ministerial in nature to implement the Trails Act. To begin the trail use process, a trail sponsor must file a formal request in an actual abandonment docket. A trail-use request has no effect on the Board's decision as to whether to grant a railroad permission to abandon the line. It is considered only after the Board has decided to permit the abandonment.

The formal trail use request must include a statement of willingness to assume financial responsibility for the property, and the trail sponsor must explicitly agree to assume responsibility for paying taxes and for any liability. The trail sponsor also must acknowledge that the use of the right-of-way as a trail is subject to the reactivation of rail service.

When the Board has decided that an abandonment will be permitted on a particular line, and a trail use request has been received regarding that line, the railroad must notify the Board of whether it is willing to negotiate a trail use agreement. If the railroad declines to negotiate, the abandonment will proceed as if no trail use request was ever filed.

On the other hand, if the railroad agrees to negotiate and no offer of financial assistance to continue rail service on the line is received, the Board will impose a trail condition which gives the trail sponsor time to negotiate a trail use agreement with the railroad. Offers of financial assistance take priority over trail use requests, because they are offers to continue actual rail service on the line.

The Board has no involvement in the negotiations between the railroad and the trail sponsor. It does not analyze, approve, or set the terms of the trail use agreements. If a trail use agreement is reached, the parties may implement it without further Board action. If no trail use agreement is reached, the trail condition expires and the line may be fully abandoned.

The Board is not authorized to regulate activities over the actual trail, and the Board has no authority to deny the trail use request if the statute has been properly invoked and the railroad has agreed to negotiate. In short, the Board's jurisdiction

is ministerial, and the Board cannot decide on whether or not rail banking or trail use is desirable.

Approval of the trail use agreement is not required from adjoining landowners, communities, or others. However, landowners or others who are concerned that the trail sponsor is not meeting its responsibilities outlined in the Board's procedures implementing the statute (such as assumption of financial responsibility) can petition the Board to look into the matter on that limited basis. Because the Board's role in administering the Trails Act is limited, landowners, communities, and other members of the public must rely on other federal, state, or local laws for resolution of any issues relating to trail development, trail maintenance, and compensation for any taking of property.

THE IMPLEMENTATION OF THE TRAILS ACT PROCESS

The Trails Act process is invoked frequently in abandonment proceedings before the Board. Statistics kept by the Board indicate that 326 trail use conditions were requested from Fiscal Year (FY) 1995 to FY 2001, and that 226 of these requests were granted. A total of 29 additional trail use requests have been filed so far in FY 2002. According to a study prepared by the General Accounting Office in October 1999, approximately 147 trails have been established or are being developed on rail banked lines. A total of 3 rail banked rights-of-way have been returned to rail service.

Over the years, there has been considerable litigation, brought by both proponents and opponents of rail banking, challenging the agency's rules and procedures for implementing the Trails Act and the Board's authority to issue trail conditions in particular circumstances. Recently, however, there have been fewer such court challenges. Currently, most Trails Act litigation involves claims by landowners that their property has been taken under the Fifth Amendment to the Constitution and that they are due just compensation. These cases are handled by the Department of Justice, with limited assistance from the Board.

CONCLUSION

The Board has limited ministerial functions under the Trails Act. It continues to perform these functions in accordance with the rail banking objective that is reflected in the current law.

The National Assoc. of Reversionary Property Owners

1075 Bellevue Way NE Suite 278 Bellevue WA 98004
(425) 646-8812 fax (425) 646-8812
(760) 771-9459 after October 15
E-mail at: dick156@earthlink.net Internet page at: http://home.earthlink.net/~dick156

Richard Welsh, Executive Director

June 12, 2002

Congressman Bob Barr
Chairman, Subcommittee on Commercial and Administrative Law
U.S. House Judiciary Committee
B-353 Rayburn House Office Building
Washington, D.C. 20215

RE: June 20, 2002 Hearing on fairness of landowner compensation on government takings

The National Association of Reversionary Property Owners (NARPO) is an educational foundation that has represented the property rights of landowners throughout the United States for the past seventeen years. NARPO specializes in the reversionary property rights of citizens who own land abutting railroad and other utility rights of way.

In 1983 Congress passed what is now known as the Rails To Trails Act and codified as 16 U.S.C. 1247(d). The Act was part of the 1983 National Trails Act amendments. Basically 1247(d) preempts all state laws on reversion of railroad rights of way to the underlying landowner upon abandonment of the road use. Most, approximately 85%, of all railroad rights of way were deeded to the nineteenth century railroads as easements for railroad use only. Before 1247(d) was enacted by Congress, these rights of way reverted to the abutting underlying landowner upon abandonment of railroad use.

1247(d) was challenged as unconstitutional as the Act took land and or rights without just compensation. The U.S. Supreme Court ruled, Preseault v. U.S., 494 U.S. 1, (1990), even though the reversionary property rights were being taken by utilization of the Act, compensation was available through the Tucker Act, 28 U.S.C. section 1491(a). Consequently, the Act was constitutional and the Preseaults could seek compensation through the U.S. Court of Federal Claims.

The Preseaults immediately initiated a lawsuit for compensation in the Court of Federal Claims. Fast forward twelve years and six court cases later, and the Preseaults have just

gotten a somewhat definitive decision. Even though the decision awards the Preseaults $234,000 plus approximately $300,000 in pre-judgment interest and $900,000 in attorney fees and costs, the Preseault are still out approximately another $500,000 in attorney fees and cost that have accumulated and were not allowed by the Federal Court of Claims judge in her May 22, 2002 decision, No. 90-4043L.

One of the biggest stumbling blocks to a much earlier decision or settlement was the foot dragging and legal obfuscation by the Department of Justice since 1990. I will not replay the case here but suffice it to say the U.S. taxpayer would be millions of dollars ahead if a settlement had occurred in 1991 instead of 2002. NARPO can only imagine the number of attorneys and hours expended on this case by Justice Department attorneys and staff. NARPO would like to remind the Subcommittee that we are talking about a right of way 8 feet wide by 1,200 feet long, not some long cross-country trail.

At last count there are twenty some class action suits against the United States on rails to trails compensation claims pending before the Federal Court of Claims with thousands of landowners attached to these suits. It is staggering the total amount of U.S. taxpayer money that will eventually be paid out to these property owners for takings compensation besides the Justice Department resources and time squandered representing the United States.

NARPO would also like to bring to the Subcommittees' attention another taxpayer funded fallout from the rails to trails act. It seems the railroads have found a windfall in implementing the rails to trails act. The courts have determined that the railroads have to voluntarily agree to a conversion from railroad use to trail use after abandonment. This gives the abandoning railroad a trump card to negotiate with a trails group. The abandoning railroads tells the potential trail entity that they will agree to trail use if the price is right. Keep in mind the railroad does not own the right of way; they only have an easement. The trail entity is then forced to pay the railroad for something they do not own. Most trail entities are a government entity so it is taxpayers funds paying the railroad for something they do not have title to.

Also the railroads have discovered another way to get into the U.S. taxpayers pocketbook. The railroad gets Arthur Anderson to give an appraisal of the right of way for an astronomical price, and then the railroad gets a government entity or 501(c)(3) non-profit entity to approve a tax deductible donation for corporate income tax purposes. A case in point, in 1996 Burlington Northern Santa Fe Railroad (BNSF) got Arthur Anderson to appraise a 12 mile right of way up for abandonment and trail use for $41 million. The railroad owned fee title to less than one mile of this right of way, but BNSF instructed Arthur Anderson to appraise the right of way as if BNSF owed it all in fee title. BNSF then sold the right of way for trail use for $3 million in cash and got a $38 million donation from the government entity; in this case King County, Washington State. In that BNSF pays corporate income tax at the 39 percent rate, this little fraud cost the U.S. taxpayers about $15 million. In fact BNSF admitted in legal papers that they got a $15

million tax reduction because of the "donation". This case is fully documented and in NARPO's possession.

The Subcommittee might be interested to know that the federal gas tax funds a good portion of these trail purchases through the TEA-21 "Enhancement" program which awards $ 1/2 billion a year from federal gas tax collections to bike trails. All in all, the taxpayers are paying for some of these trails three times.

Three years ago, Congressman Ryun from Kansas tried to rectify some of these inequities by trying to change 16 U.S.C. 1247(d) so that the trail entity, not the federal taxpayers, would have to pay the just compensation to the landowners. The bill never got out of the Parks and Natural Resources Committee.

NARPO would like to thank the Subcommittee for taking the time to look into this takings compensation issue. NARPO would be glad to supply any follow-up documentation which we have referenced in our written testimony.

Sincerely yours,

Richard Welsh, Executive director, NARPO

Questions for Mr. Sansonetti:

1. Please explain the reason for the protracted litigation in *Preseault*.

2. With regard to the court's award of attorneys fees in *Preseault*, please (a) provide an explanation of how those fees were incurred, (b) explain whether any of these fees could have been avoided, and (c) identify whether any fees were disallowed by the court.

3. With regard to the Court of Federal Claims' General Order No. 13 on Alternative Dispute Resolution, please explain (a) whether the Environment and Natural Resources Division makes regular use of these tools in its Fifth Amendment takings litigation, and (b) whether use of these tools would serve to streamline the takings litigation in the federal district courts.

4. Please explain how state property law plays a role in determining whether a particular rails-to-trails conversion results in Fifth Amendment taking.

5. Please explain whether the *Preseault* decision will serve as precedent in determining whether a taking has occurred in other pending cases.

6. During his testimony, Mr. Ackerson indicated that a requirement that the railroad provide a copy of the original conveyance documents to the Surface Transportation Board would serve to expedite and reduce costs in litigation. Would the Department of Justice support implementation of such a requirement?

7. What is the Department of Justice's position with regard to the use of class actions in Fifth Amendment takings litigation, and does the Court of Federal Claims take a different position with regard to class actions than does the district courts.

8. Please provide a copy of the letter which Mr. Sansonetti submitted to the Chief Judge for the Court of Federal Claims, and indicate (a) whether any other changes to the rules were suggested but not implemented and (b) whether these changes would serve to streamline Fifth Amendment takings litigation.

9. Identify any legislative remedies which the Department of Justice believes would serve to streamline rails-to-trails litigation.

10. Identify all federal rails-to-trails takings cases where a court has reach a final decision on liability, and explain the legal basis for the court's decision in each case.

Question for Mr. Ackerson:

1. In your oral testimony you stated that the United States seeks to address the "complicated issues" first. Please identify what you meant by the "complicated issues" and explain how addressing these issues first served to delay resolution of the litigation.